## Index to Record in Court of Appeals.


| | Page |
|---|---|
| Defendant's Notice of Appeal | 733 |
| People's Notice of Appeal | 735 |
| Certificate Granting Leave to Appeal | 737 |
| Judgment Appealed From | 739 |
| Opinion | 741 |
| Certification Pursuant to Rule 2105 | 743 |

## Index.


| | Page |
|---|---|
| Statement Under Rule 234 | 1 |
| Notice of Appeal | 2 |
| Information | 3 |
| Endorsements on Information | 119 |
| Bill of Particulars | 123 |
| Case and Exceptions | 124 |
| Motions | 673 |
| Minutes, November 16, 1960 | 699 |
| Minutes of Sentence | 702 |
| Opinion | 720 |
| Notice of Appearance | 729 |
| Stipulation as to Exhibits | 730 |
| Clerk's Certificate | 731 |


### TESTIMONY.

WITNESSES FOR PEOPLE:


| | |
|---|---|
| Abrams, Bernard: | |
| Direct | 644 |
| Cross | 651 |
| Re-direct | 652 |
| Barasch, Marilyn: | |
| Direct | 492 |
| Cross | 528 |
| Bilberw, Gene: | |
| Direct | 530 |
| Cross | 540 |
| Re-direct | 545 |

Page

Dreyer, Jay:
Direct ..... 653
Cross ..... 659
Re-direct ..... 662

Gurnewald, Edward:
Direct ..... 163
Cross ..... 165

Hackshaw, Leotha:
Direct ..... 408
Cross ..... 419

Hartigan, James:
Direct ..... 490

Hayman, Paul:
Direct ..... 373
Cross ..... 380
Re-direct ..... 390
Re-cross ..... 394

Hurley, Herbert C.:
Direct ..... 166
Cross ..... 173

Johnson, Kenneth:
Direct ..... 425
Cross ..... 451

Levenberg, Norman:
Direct ..... 174
Cross ..... 281

Lieberman, Abraham:
Direct ..... 546
Cross ..... 548

Lydon, John F., Jr.:
Direct ..... 625

Plansker, George:
Direct ..... 133
Cross ..... 155

Page

Rosen, Hyman:
Direct ..... 395
Cross ..... 403
Re-direct ..... 406
Re-cross ..... 406

Shaffer, Alfred H.:
Direct ..... 594

Shaller, Oscar:
Direct ..... 598
Cross ..... 606

Stanton, Ernest:
Direct ..... 478
Cross ..... 489

Tyson, Robert S.:
Direct ..... 613
Cross ..... 619
Re-direct ..... 622

Vaccarella, Peter C.:
Direct ..... 557
Cross ..... 566
Re-direct ..... 575

Yeeto, Dorothy:
Direct ..... 578
Cross ..... 592

WITNESSES FOR DEFENDANT:

Adler, Frank:
Direct ..... 664
Cross ..... 667

Walsh, William:
Direct ..... 642

## EXHIBITS.

(See Stipulation as to Exhibits, page 730 herein.)

PEOPLE'S EXHIBITS:


| | | Admitted page |
|---|---|---|
| 1. | Book "Chances Go Around" | 194 |
| 1A through 1L. | Scene drawings | 256 |
| 2. | Book "Impact" | 196 |
| 3. | Book "Female Sultan" | 196 |
| 4. | Book "Satin Satellite" | 198 |
| 4A. | Cardboard | 257 |
| 5. | Book "Her Highness" | 201 |
| 6. | Book "Mistress of Leather" | 201 |
| 7. | Book "Educating Edna" | 202 |
| 8. | Book "Strange Passions" | 203 |
| 9. | Book "The Whipping Chorus Girls" | 203 |
| 10. | Book "Order of the Day" and "Bound Maritally" | 204 |
| 11. | Book "Dance With a Dominant Whip" | 206 |
| 12. | Book "Cult of Spankers" | 206 |
| 13. | Book "Confessions" | 206 |
| 14. | Book "The House of Torture" | 209 |
| 15. | Book "Bound in Rubber" | 209 |
| 16. | Book "Arduous Figure Training at Bondhaven" | 211 |
| 17. | Book "Return Visit to Fetterland" | 211 |

Admitted page

18. Book "Fearful Ordeal in Restraint-land" ..... 212
19. Book "Women in Distress" ..... 213
20. Book "Pleasure Parade, Volume 1" .... 214
21. Book "Screaming Flesh" ..... 215
21A. Cardboard ..... 258
22. Book "Fury" ..... 216
23. Book "So Firm and So Fully Packed" 216
23A. Cardboard ..... 259
23B. Cardboard ..... 259
24. Book "I'll Try Anything Twice" ..... 217
24A. Cardboard ..... 261
25. Book "Masque" ..... 218
25A. Cardboards ..... 264
25B. Cardboard ..... 265
26. Book "Catanis" ..... 218
26B. Cardboard ..... 266
27. Book "The Violated Wrestler" ..... 219
28. Book "Betrayal" ..... 219
28A. Cardboard ..... 267
29. Book "Swish Bottom" ..... 220
29A. Cardboard ..... 267
30. Book "Raw Dames" ..... 221
30A. Cardboard ..... 268
31. Book "The Strap Returns" ..... 375

| | | Admitted page |
|---|---|---|
| 32. | Book "Dangerous Years" | 379 |
| 33. | Book "Run Girl, Run Hard" | 475 |
| 34. | Book "This Way Down" | 222 |
| 34A. | Cardboard | 269 |
| 34½. | Cardboard carton | 145 |
| 35. | Book "The French Girl on the Stairs, Part 1" | 223 |
| 36. | Book "French Girl on the Stairs, Part 2" | 225 |
| 37. | Book "Smooth and Sassy" | 225 |
| 37A. | Cardboard | 270 |
| 38. | Book "Tattletales" | 226 |
| 39. | Book "Look at Her Motor Turn Over" | 226 |
| 40. | Book "Sex Switch" | 227 |
| 41. | Book "The Hollywood Spankers" | 227 |
| 42. | Book "Anecdotia Spankiana" | 228 |
| 43. | Book "Columns of Agony" | 230 |
| 44. | Book "The Tainted Pleasure" | 231 |
| 45. | Book "Intense Desire" | 232 |
| 46. | Book "The House of Torture" | 236 |
| 47. | Book "Bound in Rubber" | 236 |
| 48. | Book "Arduous Figure Training at Bondhaven" | 236 |
| 49. | Book "Return Visit to Fetterland" | 236 |
| 50. | Book "Women in Distress" | 236 |

Admitted page

51. Book "Pleasure Parade, Volume Number 4" ..... 236
52. Book "Pleasure Parade, Volume Number 3" ..... 237
53. Book "Pleasure Parade, Volume Number 2" ..... 237
54. Book "Pleasure Parade, Volume Number 1" ..... 238
55. Book "Sorority Girls Stringent Initiation" ..... 238
56. Book "Terror at the Bizarre Art Museum" ..... 238
57. Book "Screaming Flesh" ..... 239
58. Book "Fury" ..... 240
59. Book "Masque" ..... 240
60. Book "Temptation" ..... 244
60A. Cardboard ..... 271
$60_1$. Cardboard carton ..... 145
61. Book "Peggy's Distress on the Planet Venus" ..... 245
62. Book "Ways of Discipline" ..... 245
63. Book "Mrs. Tyrant's Finishing School" 246
64. Book "Perilous Assignment" ..... 246
65. Book "The French Girl on the Stairs, Part 2" ..... 247
66. Book "Tattletales" ..... 248
67. Book "Look at Her Motor Turn Over" 248

| | | Admitted page |
|---|---|---|
| 68. | Book "Bondage Correspondence" | 248 |
| $68_1$. | Carton | 151 |
| 69. | Book "Woman Impelled" | 249 |
| 70. | Book "Eyewitnesses" | 249 |
| 70A. | Cardboard | 271 |
| 71. | Book "Stud Broad" | 249 |
| 71A. | Cardboard | 272 |
| 72. | Book "Queen Bee" | 252 |
| $72_1$. | Container | 165 |
| 72A. | Cardboard | 272 |
| 73. | Envelope | 172 |
| 73A, B and C. | Three slips of paper | 276 |
| 74. | Contract | 401 |
| 75. | Sheet of paper | 432 |
| 76. | Payroll book | 647 |
| 77. | Manila envelope | 491 |
| 77A, B, C and D. | Papers | 507 |
| 77F. | Folder | 513 |
| 78. | Folder | 493 |
| 79A, B, C, D and E. | Papers | 508 |
| 79 and 80. | Two pieces of paper | 519 |
| 81. | Document | 526 |
| 82. | Bill | 586 |
| 83. | Bill for manuscript | 588 |

| | | Admitted page |
|---|---|---|
| 84. | Bill | 588 |
| 85. | Bill for book | 589 |
| 86. | Bill for manuscript | 589 |
| 87. | Bill | 591 |
| 88. | Bill | 591 |
| 89. | Bill | 592 |
| 90. | Bill | 592 |
| 91. | Mortgage extension | 596 |
| 92. | Ledger sheet | 599 |
| 93. | Certificate of incorporation | 613 |
| 94. | Lease | 635 |
| 95. | Paper | 618 |
| 96. | Paper | 618 |
| 97. | Card | 638 |
| 98. | Book | 645 |

DEFENDANT'S EXHIBIT:

| | | |
|---|---|---|
| A. | Treatise | 476 |

COURT'S EXHIBITS:

| | | |
|---|---|---|
| A, B and C. | Charts | 129 |

| | Original | Print |
|---|---|---|
| Remittitur of the Court of Appeals of the State of New York | 745 | 745 |
| Notice of appeal to the Supreme Court of the United States filed in the Criminal Court of the City of New York, County of New York | 748 | 747 |
| Clerk's certificate of the Criminal Court of the City of New York | 751 | 749 |
| Order amending the remittitur | 752 | 749 |
| Order noting probable jurisdiction | 753 | 751 |

## NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

EDWARD MISHKIN,

*Defendant-Appellant.*

### Statement Under Rule 234.

The nature and object of the above entitled action is a prosecution of the defendant for violation of Section 1141 of the Penal Law. The action was commenced by the filing of the informations in the Court of Special Sessions of the City of New York, County of New York on the 8th day of March, 1960.

The judgment of conviction was entered on 14th day of December, 1960. The notice of appeal was filed on the 19th day of December, 1960.

The names of the original parties appear in the above-entitled caption and no changes have taken place. There has been a change in the attorneys for the defendant and Emanuel Redfield now appears for the appellant. Frank S. Hogan, District Attorney of the County of New York appears for the respondent.

4 **Notice of Appeal.**

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

5 EDWARD MISHKIN,

*Defendant.*

SIR:

Please Take Notice, that the defendant above named, Edward Mishkin, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, from the judgment of conviction entered against him in this Court, on the 14th day of December, 1960, and from each and every part of said judgment.

6

Dated: New York, N. Y., December 19th, 1960.

Yours, etc.,

SAMUEL SEGAL
Attorney for Defendant
Office & P. O. Address
Eleven Broadway
Borough of Manhattan
City of New York

**Information.**

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,

*against*

EDWARD MISHKIN,

*Defendant.*

Be it Remembered that I, FRANK S. HOGAN, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the crime of POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intend to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Chances Go Round" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

10 *Information*

## SECOND COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give
11 away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character entitled, "Impact" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## THIRD COUNT

12 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "Female Sultan" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## FOURTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Satin Satellite", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## FIFTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

16 *Information*

The said defendant, on or about January 13, 1960 and prior thereto in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Her Highness",
17 whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

SIXTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto in the County of New
18 York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Mistress of Leather", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information*

## SEVENTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Educating Edna", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## EIGHTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 11, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "Strange Passions", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

NINTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

23

The said defendant, on or about January 11, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "The Whipping Chorus Girls", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

24

TENTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

*Information*

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Order of the Day and Bound Maritally", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

ELEVENTH COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Dance With The Dominant Whip", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

28 *Information*

TWELFTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give
29 away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Cult of the Spankers", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

THIRTEENTH COUNT

30 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "Confessions", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## FOURTEENTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "The House of Torture", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## FIFTEENTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

*Information*

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Bound in Rubber", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## SIXTEENTH COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Arduous Figure Training at Bondhaven", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## SEVENTEENTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Return Visit to Fatterland", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## EIGHTEENTH COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "Fearful Ordeal in Restraintland", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## NINETEENTH COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Women in Distress", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## TWENTIETH COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

*Information*

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Pleasure Parade No. 1", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

TWENTY-FIRST COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Screaming Flesh", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

46 *Information*

22nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give
47 away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Fury", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

23rd COUNT

48 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "So Firm and So Fully Packed", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

24th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows: 50

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story writing and paper of an indecent character, entitled "I'll Try Anything Twice", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 51

25th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

52 *Information*

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story writing and paper of an indecent
53 character, entitled "Mosque", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

26th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13,
54 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Catanis", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 55

27th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain 56
obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Violated Wrestler", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

28th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by 57
this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an in-

decent character, entitled "Betrayal", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

29th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Swish! Bottom!", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

30th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

*Information* 61

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Raw Dames", whereof a more particular description would be offensive 62
to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

31st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant on or about January 13, 1960 and prior thereto in the County of New 63
York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "The Strap Returns", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

64 *Information*

32nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about January 13, 1960 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give
65 away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Dangerous Years", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

33rd COUNT

66 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "Enter the Blackmailer", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

34th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows: 68

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Chances Go Round", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 69

35th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

70 *Information*

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Impact", whereof a
71 more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

36th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30,
72 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Strange Passion", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information*

37th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Columns of Agony", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

38th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "The Tainted Pleasure", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

39th COUNT

77 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an in-
78 decent character, entitled "Intense Desire", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

40th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "The House of Tortture", whereof a more particular description 80
would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

41st COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New 81
York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Bound in Rubber", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

82 *Information*

42nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give
83 away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Arduous Figure Training at Bondhaven", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

84 43rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic,

masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Return Visit to Fetterland", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

44th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Woman in Distress", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

45th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

88 *Information*

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Pleasure Parade, No.
89 4", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

46th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30,
90 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Pleasure Parade, No. 3", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## 47th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Pleasure Parade, No. 2", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## 48th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

94 *Information*

phlet, story paper, writing and paper of an indecent character, entitled "Pleasure Parade No. 1", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

49th COUNT

And I, the District Attorney aforesaid, by
95 this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an in-
96 decent character, entitled "Sorority Girls Stringent Initiation", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

50th COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

*Information*

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Terror at the Bizarre Art Museum", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

51st COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Screaming Flesh", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

100 *Information*

52nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give
101 away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Fury", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

53d COUNT

102

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 20, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "Mosque", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

54th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Catanis", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

55th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

106 *Information*

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Betrayal", whereof a obscene, lewd, lascivious, filthy, indecent, sadistic,
107 more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

56th COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New
108 York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Swish! Bottom!", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 109

57th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Temptation", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 110

58th COUNT 111

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pam-

phlet, story paper, writing and paper of an indecent character, entitled "Peggy's Distress on Planet Venus" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

59th COUNT

113 And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an in-
114 decent character, entitled "Ways of Discipline" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

60th COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

*Information* 115

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Mrs. Tyrant's Finishing School" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 116

61st COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Books, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give away, distribute and show, and possess with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Perilous Assignment" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 117

118 *Information*

62nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY POSSESSING OBSCENE BOOKS, committed as follows:

The said defendant, on or about December 30, 1959 and prior thereto, in the County of New York, unlawfully did sell, lend, give away, distribute and show, and offer to sell, lend, give
119 away and show, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story paper, writing and paper of an indecent character, entitled "Hellion in Blue", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

63rd COUNT

120 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of July 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Chances Go Round", whereof a more particular description would be

offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

64th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about August 12, 122
1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Impact" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

65th COUNT 123

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on and about the month of November, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Female Sultan",

whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

66th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about March 27, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Satin Satellite", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

67th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about September 9, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent

character, entitled "Her Highness", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

68th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING 128 OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of July, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Mistress of Leather", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 129

69th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of September, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book,

130 *Information*

magazine, pamphlet, story, writing and paper of an indecent character, entitled "Educating Edna", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

70th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by
131 this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about September 12, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Strange Passions", whereof a more particular description would be offensive to this court and improper to be spread upon
132 the records thereof, wherefore such description is not here given.

71st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant on or about September 12, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic,

masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "The Whipping Chorus Girls", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

72nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by 184
this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about May 13, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Order of the Day and Bound Maritally", whereof a more particular description would be offensive to this court and improper to be spread 135
upon the records thereof, wherefore such description is not here given.

73rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about July 31, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene,

lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Dance with the Dominant Whip," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

74th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about July 10, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Cult of the Spankers", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

75th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about August 28, 1958 in the County of New York, unlawfully did

publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Confessions", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## 76th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "The House of Torture", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## 77th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

142 *Information*

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Bound in Rubber", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore
143 such description is not here given.

78th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious,
144 filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Arduous Figure Training at Bondhaven", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 145

79th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Return Visit to Fetterland", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 146

80th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows: 147

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Fearful Ordeal in Restraintland", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

148 *Information*

81st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious,
149 filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Women in Distress", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

82nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defend-
150 ant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Pleasure Parade No. 1", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information*

83rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Pleasure Parade No. 2" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

84th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Pleasure Parade No. 3", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

154 *Information*

85th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December, 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious,
155 filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Pleasure Parade No. 4", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

86th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defend-
156 ant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of December, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic, and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Screaming Flesh", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 157

87th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of April, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, 158
magazine, pamphlet, story, writing and paper of an indecent character, entitled "So Firm and So Fully Packed", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

88th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows: 159

The said defendant, on or about March 18, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Masque", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

160 *Information*

89th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about October 13, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic,
161 masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Violated Wrestler", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

90th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OB-
162 SCENE BOOKS, committed as follows:

The said defendant, in and about the month of December 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Swish! Bottom!", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 163

91st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of February 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, 164
magazine, pamphlet, story, writing and paper of an indecent character, entitled "Raw Dames", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

92nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows: 165

The said defendant, in and about the month of April 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "The Strap Returns", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

166 *Information*

93rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of April 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent,
167 sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Dangerous Years", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

94th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defend-
168 ant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of October 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Enter the Blackmailer", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information*

95th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about May 14, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Columns of Agony", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

96th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "The Tainted Pleasure", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

172 *Information*

97th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about May 13, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, mas-
173 ochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Intense Desire", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

98th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OB-
174 SCENE BOOKS, committed as follows:

The said defendant, in and about the month of Nov., 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Sorority Girls Stringent Initiation", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 175

99th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of Nov., 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, 176
magazine, pamphlet, story, writing and paper of an indecent character entitled "Terror at the Sigarro Art Museum", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

100th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows: 177

The said defendant on or about March 15, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Temptation", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

178 *Information*

101st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent,
179 sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Peggy's Distress on Planet Venus", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

102nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defend-
180 ant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Days of Discipline", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information*

103rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Mrs. Tyrant's Finishing School", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

104th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Perilous Assignment", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

184 *Information*

105th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant in and about the month of April 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Hellion in Blue", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

185

106th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

186

The said defendant in and about the month of Oct. 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Woman Impelled", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 187

107th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Bondage Correspondence", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 188

108th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows: 189

The said defendant, in and about the month of December 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Eye Witness", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

190 *Information*

109th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about June 30, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, mas-
191 ochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Stud Broad", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

110th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defend-
192 ant of the Crime of UNLAWFULLY PUBLISHING OBSCENE BOOKS, committed as follows:

The said defendant, on or about August 12, 1958, in the County of New York, unlawfully did publish, manufacture and prepare a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Queen Bee", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

193

111th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of July 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in 194
designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Chances Go Round", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

112th COUNT

195

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about August 12, 1958 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd,

196 *Information*

lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Impact", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

113th COUNT

197 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in or about the month of November 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story,
198 writing and paper of an indecent character, entitled "Female Sultan", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

114th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

*Information* 199

The said defendant, on or about March 27, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Satin Satellite", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 200

115th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about September 9, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Her Highness", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 201

202 *Information*

116th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of July 1958 and prior thereto in the County of New York, unlawfully did hire, employ, use and
203 permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Mistress Leather", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

204 117th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of September 1958 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare,

and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Educating Edna", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## 118th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about September 12, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Strange Passions", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

208 *Information*

119th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about September 12, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and per-
209 mit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "The Whipping Chorus Girls", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

210 120th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about May 13, 1958 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in design-

211

ing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Order of the Day and Bound Maritally", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

212

121st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about July 31, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and 213 preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Dance with The Dominant Whip", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

214 *Information*

122nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about July 10, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other
215 persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Cult of the Spankers", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

123rd COUNT

216

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about August 28, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manu-

facturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Confessions", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

## 124th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "The House of Torture", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

220 *Information*

125th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto, in the County of New York, unlawfully did hire,
221 employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Bound in Rubber", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

222 126th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare,

and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book. magazine, pamphlet, story, writing and paper of an indecent character, entitled "Arduos Figure Training at Bondhaven", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

127th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Return Visit to Fetterland", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

226 *Information*

128th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto, in the County of New York, unlawfully did hire,
227 employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Fearful Ordeal in Restraintland", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

228 129th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare,

and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Women in Distress", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

130th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Pleasure Parade, No. 1.", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

232 *Information*

131st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto, in the County of New York, unlawfully did hire,
233 employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Pleasure Parade, No. 2" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

234 132nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare,

and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Pleasure Parade, No. 3" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

133rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and between the months of August and December 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Pleasure Parade, No. 4", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

238 *Information*

134th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of December 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter,
239 publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Screaming Flesh", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

135th COUNT

240

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of April 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd,

lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "So Firm and So Fully Packed", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

136th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about March 18, 1958 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Mosque", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

137th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

244 *Information*

The said defendant, on or about October 13, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Violated
245 Wrestler", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

138th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of December 1958 and prior thereto, in the County
246 of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Swish! Bottom!" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information*

139th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of February 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Raw Dames", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

140th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of April 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic

and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled, "The Strap Returns", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

141st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of April 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled, "Dangerous Years", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

142nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

253

The said defendant, in and about the month of February 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled, "Run Girl, Run Hard", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

254

143rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of October 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled, "Enter The Blackmailer", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

255

256 *Information*

144th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about May 14, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish,
257 manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled, "Columns of Agony" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

145th COUNT

258 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic

and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled, "The Tainted Pleasure", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

146th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows: 260

The said defendant, on or about May 12, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Intense Desire", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 261

147th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

262 *Information*

The said defendant, in and about the month of November 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Sorority Girls Stringent Initiation",
263 whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

148th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of
264 November 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Terror at the Bizarre Art Museum" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 265

149th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about March 15, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Temptation" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 266

150th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows: 267

The said defendant, in and about the month of May 1959 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic

268 *Information*

and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Peggy's Distress on the Planet Venus", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

151st COUNT

269 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story,
270 writing and paper of an indecent character, entitled "Ways of Discipline", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

152nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

271

The said defendant, in and about the month of May 1959 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Mrs. Tyrant's Finishing School", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

272

153rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of May 1959 and prior thereto in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Perilous Assignment", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

273

274 *Information*

154th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of April 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter,
275 publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled, "Hellion in Blue", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

155th COUNT

276

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, in and about the month of October 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic

and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Woman Impelled", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

156th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows: 278

The said defendant, in and about the month of May 1959 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Bondage Correspondence" whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 279

157th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

280 *Information*

The said defendant, in and about the month of December 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Eye Witness" whereof a more particular
281 description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

158th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about June 30, 1958 and prior thereto, in the County of New
282 York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Stud Broad", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

*Information* 283

159th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of UNLAWFULLY HIRING OTHERS TO PREPARE OBSCENE BOOKS, committed as follows:

The said defendant, on or about August 12, 1958 and prior thereto, in the County of New York, unlawfully did hire, employ, use and permit other persons to design, print, utter, publish, manufacture and prepare, and to assist in designing, printing, uttering, publishing, manufacturing and preparing a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, magazine, pamphlet, story, writing and paper of an indecent character, entitled "Queen Bee", whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given. 284

160th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows: 285

The said defendant, in and about the month of July, 1959, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Chances Go Round", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and

286 *Information*

publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

161st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

287

The said defendant, on or about August 12, 1959, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Impact", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

288

162nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of November, 1959, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Female Sultan", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

163rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about March 27, 1959 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Satin Satellite", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

292 *Information*

164th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about September 9, 1959 in the County of New York, being the owner, proprietor, publisher and printer of a publication
293 entitled "Her Highness", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

165th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by
294 this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of July 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Mistress of Leather", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neg-

lect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

## 166th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of September 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Educating Edna", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

## 167th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about September 12, 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Strange Passions", and being the officer

298 *Information*

of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

168th COUNT

299 And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Failing to Print Publisher and Printer's Name and Address, committed as follows:

The said defendant, on or about September 12, 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "The Whipping Chorus Girls", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, re-
300 print and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

169th COUNT

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Failing to Print Publisher and Printer's Name and Address, committed as follows:

*Information*

The said defendant, on or about May 13, 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Order of the Day and Bound Maritally", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

## 170th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about July 31, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Dance with the Dominant Whip", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

304 *Information*

171st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about July 10, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a
305 publication entitled "Cult of the Spankers", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

172nd COUNT

306 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about August 28, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Confessions", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neg-

lect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

173rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed 308
as follows:

The said defendant, in and between the months of August and December 1959, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "The House of Torture", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher 309
and printer.

174th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

310 *Information*

The said defendant, in and about the month of December 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Screaming Flesh" and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at
311 the end of the publication, the true name and address of the publisher and printer.

175th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of April, 1958, in the County of New York, being
312 the owner, proprietor, publisher and printer of a publication entitled "So Firm and So Fully Packed", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

*Information* 313

176th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about March 18, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Masque", and being the 314
officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

177th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by 315
this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about October 13, 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Violated Wrestler", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint

and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

178th COUNT 2 Ex

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

317

The said defendant, in and about the month of December 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Swish: Bottom!", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

318

179th COUNT 1 Ex

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of February 1959, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Raw Dames", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

180th COUNT 1 Ex

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of April 1959, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "The Strap Returns", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

322 *Information*

181st COUNT 1 Ex

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of April 1959, in the County of New York, being the owner, proprietor, publisher and printer
323 of a publication entitled "Dangerous Years", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

182nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by
324 this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of May 1959, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "This Way Down", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and

neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

## 183rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about March 18, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "French Girl on the Stairs, Part I" and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

## 184th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about March 18, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "French Girl on the Stairs,

328 *Information*

Part II", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

185th COUNT

329 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about September 4, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Smooth and Sassy", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint
330 and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

186th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

331

The said defendant, on or about September 29, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Tattle Tales", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

332

187th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of April, 1960 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Look at Her Motor Turn Over", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

333

334 *Information*

188th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about June 8, 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publica-
335 tion entitled "Sex Switch" and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

189th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by
336 this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about July 10, 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Hollywood Spankers", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail

337

and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

190th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

338

The said defendant, in and about the month of April, 1959 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Spank-inns", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

339

191st COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of October, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Enter the Blackmailer",

and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

192nd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about May 14, 1958 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Columns of Agony", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

193rd COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

343

The said defendant, in and about the month of May, 1959 in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "The Tainted Pleasure", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

344

194th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about March 15, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Temptation", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

345

346 *Information*

195th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of April 1959, in the County of New York, being the owner, proprietor, publisher and printer of
347 a publication entitled "Hellion in Blue", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

196th COUNT

348 AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, in and about the month of December, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Eye Witness", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail

and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

197th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about June 30, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a publication entitled "Stud Broad", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

352 *Information*

198th COUNT

AND I, THE DISTRICT ATTORNEY AFORESAID, by this information, further accuse the said defendant of the Crime of FAILING TO PRINT PUBLISHER AND PRINTER'S NAME AND ADDRESS, committed as follows:

The said defendant, on or about August 12, 1958, in the County of New York, being the owner, proprietor, publisher and printer of a
353 publication entitled "Queen Bee", and being the officer of a corporation and officer and manager of a partnership owning and publishing said publication, unlawfully did print, reprint and publish said publication, and omit, fail and neglect to have conspicuously imprinted on the cover, title and copyright page, and at the end of the publication, the true name and address of the publisher and printer.

FRANK S. HOGAN,
District Attorney.

354

**Endorsements on Information.** 355

Cal. No. 4358
5014

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

THE PEOPLE

356

*vs.*

EDWARD MISHKIN

Bail

Information
Obscene Books, etc.

FRANK S. HOGAN
District Attorney

Filed Mar 8 1960
Adjournments 357
D 6/2/60
Murtagh
Mar 9 1960
Arraigned on Return of Bench Warrant For all Purposes 3/30 Pt I
Bail Fixed @ $25,000

JOHN M. MURTAGH
Presiding Justice

358 *Endorsements on Information*

Mar 30, 1960
Loscalzo 38
AP 4/29
Apr. 29 1960
Martinis 2
AP 5/4
Defendant Pleads Not Guilty
5/18

Oct 24 1960 Part 3—Cal No. 5
359 Breslin Galloway Gassman
On motion of A D. A. Stein Cts 33-34-35-36-54-55-56-62-94-105-143-154-191-195
Dismissed.

Oct 25 1960 Part 3—Cal No. 28
Breslin Galloway Gassman
On Trial, Con't
10/26/60

Oct 26 1960 Part 3—Cal No. 6
Breslin Galloway Gassman
On Trial, Con't
360 10/27/60

Oct 27 1960 Part 3—Cal No. 2
Breslin Galloway Gassman
On Trial, Con't.
Oct 31/60

Oct 31 1960 Part 3—Cal No. 8
Breslin Galloway Gassman
On Trial, Con't.
11/7—11 A. M.

*Endorsements on Information* 361

Nov 7 1960 Part 3—Cal No. 2
Breslin Galloway Gassman
On Trial, Con't.
11/16/60

Nov 16 1960 Part 3—Cal No. 1
Breslin Galloway Gassman

On Trial. Defendant Convicted as to 1 to 32 incl., 37 to 53 inclusive, 57 to 61 incl., 63 to 65 incl., 67 to 87 incl. 106 to 113 incl. 115 to 135 incl., 137 to 141 incl., 144 to 148 incl., 150 to 153 incl., 155 to 162 incl., 164 to 175 incl., 185 to 190 incl., 192, 193, and 196 to 198 incl. 362

Investigation & Sentence
December 14, 1960

As to Counts 66, 88, 100, 114, 136, 142, 149, 163, 176, 183, 184 and 194 deft. is acquitted.
(See decision and opinion attached.)

E. F. BRESLIN
Presiding Justice 363

Edward Mishkin

Count #1—$3000 fine or 1 year penitentiary Com #1860

Count #48—$3000 fine or 1 yr. penitentiary and in addition 1 yr. penitentiary Com #1861

Count #65—$3000 fine or 1 yr. penitentiary and in addition 1 yr. penitentiary
Each of above three sentences to run consecutively. Com #1862.

364 *Endorsements on Information*

Count #111—$3000 fine or yr. penitentiary and in addition 1 year penitentiary, to run concurrently with sentence imposed in Count #65.

Count #160—$500 fine Total fine $12,500

Cts #2 to 32 incl. Cts #37 to 41 incl. 41-47 incl. 49 to 53 incl. 57 to 61 incl. SENTENCE SUSPENDED

Cts #63, 64, 67 to 87 incl. 89 to 93 incl. 95 to 99 incl. 101 to 104 incl., and 106 to 110 incl.
365 SENTENCE SUSPENDED

Cts #112, 113, 115 to 135 incl. 137 to 141 incl. 144 to 148 incl., 150 to 153 incl. and 155 to 159 inclusive. SENTENCE SUSPENDED.

Cts #161, 162; 164 to 175 incl., 177 to 183 incl. 185 to 195 incl. and 192, 193, 196, 197 and 198 SENTENCE SUSPENDED.

B. GASSMAN
Presiding Justice

Dec. 14 1960 Part 3—Cal No.
Gassman Galloway Breslin

366

**Bill of Particulars.** 367

COURT OF SPECIAL SESSIONS

COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK

*against*

EDWARD MISHKIN

*Defendant* 368

State of New York,
County of New York,

The People of the State of New York, in the above entitled action, furnish the following as a bill of particulars.

1. Under Counts 1 through 62, it will be claimed that the defendant possessed with intent to sell, lend, give away and show the articles referred to therein.

2. At the times the articles referred to under 369
Counts 1 through 62 were obtained by members of the Police Department of New York City they were not in the immediate physical possession of the defendant.

Dated August 31, 1960.

FRANK S. HOGAN
District Attorney
New York County

To

Michael Kern
37 Wall Street
New York, New York

370 **Case and Exceptions.**

COURT OF SPECIAL SESSIONS, CITY OF NEW YORK,

COUNTY OF NEW YORK,

Part III.

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THE PEOPLE OF THE STATE OF NEW YORK

*against*

371

EDWARD MISHKIN,

*Defendant.*

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Calendar No. 5
Information No. 5014/60
Charge: Obscene Books

TRIAL

Held at

372 Criminal Courts Building
100 Centre Street
New York 13, N. Y.

October 24, 1960

Before:

Hon. Edward F. Breslin,
Justice Presiding.
Hon. Benjamin Gassman,
Associate Justice.
Hon. Edward T. Galloway,
Associate Justice.

Appearances:

For the People: Melvin Stein, Esq., Assistant District Attorney, New York County, 155 Leonard Street, New York 13, N. Y.

For the Defendant: Michael Kern, Esq., 37 Wall Street, New York, N. Y.

(First call.)

Court Officer: Five—Edward Mishkin.

Assistant District Attorney Perry: Second 374
call.

Court Clerk: Mr. Stein is here.

Court Reporter: Counsellor, may I have your name and address for the record, please?

Mr. Kern: Michael Kern, K-e-r-n, 37 Wall Street, New York City.

Mr. Stein: People are ready, Your Honor.

Mr. Kern: Defendant is ready.

Justice Breslin: All right. Marked ready.

Court Officer: Marked ready. Have a seat, please.

(Trial.) 375

Justice Breslin: All right. Number 5.

Court Officer: Five—Edward Mishkin.

Justice Breslin: Are both sides ready?

Mr. Stein: People are ready.

Mr. Kern: Yes, Your Honor.

Justice Breslin: All right. Proceed.

Mr. Stein: Did you have anything you wanted to say?

Mr. Kern: Yes. May I make a couple of motions—

Justice Breslin: Yes. Go right ahead.

376 *Case and Exceptions*

Mr. Kern: —at the outset, if the Court please?

I am directing myself to the information which was filed in the court by virtue—or pursuant to the presentation of evidence made to the Grand Jury of the County of New York.

I respectfully move the Court at the beginning of this trial to dismiss each and every count of the indictment—

Justice Breslin: Information.

Mr. Kern: —on the ground that the same do
377 not allege knowledge on the part of the defendant that the books allegedly possessed, Counts 1 to 62 inclusive, and the books allegedly published, Counts 63 110 inclusive, or for the publication of which the defendant allegedly hired other, Counts 111 to 159 inclusive, or upon which he allegedly failed to set forth the publishers' and printers' names and addresses, Counts 160 to 198 inclusive, were, in fact, obscene, lewd, lascivious, filthy, indecent, masochistic, sadistic, and disgusting.

I further move the Court to dismiss the information on the ground that the statute, Section
378 1141 of the Penal Law, is unconstitutional for the reason, among others, that the said statute fixes responsibility without requiring knowledge or scienter on the part of the defendant of the counts allegedly violative of the law or such knowledge referred to in the motion preceding the one which is now made and tends towards a substantial restriction on freedom of speech and freedom of the press and thus violates the First Amendment of the Constitution of the United States providing that Congress shall make no law abridging the freedom of speech or of the press and the due process clause of the Fourteenth Amendment.

I further move the Court to dismiss the information on the ground that the counts therein contained do not set forth a crime.

Justice Breslin: All right. Your motions are denied. You may have an exception.

Mr. Kern: I respectfully except.

Mr. Stein: Your Honor, I have just a few preliminary statements I want to make, more in terms of indicating to the Court certain agreements Mr. Kern and I have entered into, and also explaining the information, which is rather complex. I will be extremely brief. 380

For the benefit of the Court, I have taken the liberty of photostating the information. I have two additional copies, which I submit are accurate ones; and I would like to offer these to the two additional judges on the bench. (Submits same.)

Now, there are 198 counts in this information. They come under four separate provisions of the Penal Law. These are possession with intent to sell of these obscene books, publishing of an obscene book, hiring of other persons to prepare these obscene books, and for the violation of the General Business Law in that the defendant failed to state the true name and address of the publisher and printer of these works. 381

There are several titles—fifty-one in all—which we allege are pornographic. There are, also, additional titles, for which we allege merely the violation of the General Business Law. But for most of these we allege to be pornographic we also allege the violation of the General Business Law.

To assist the Court in following this testimony, I have prepared, with the consent of Mr.

Kern, certain charts, one copy of which I offer to Mr. Kern and one copy to each of the judges, which indicate each of the titles of the books found in the information.

Now, to the left—

Mr. Kern: Well, may I, at this point, ask the district attorney—I think this might be in the nature of a request—that he state particularly under which section he proceeds? Now, Mr. Stein said that the information is based upon four subdivisions—

383 Mr. Stein: Yes.

Mr. Kern: —of Section 1141 of the Penal Law. I most respectfully disagree, and I think the Court should make a ruling now.

Mr. Stein: I am sorry. Go ahead.

Mr. Kern: I think that the publishing counts and the possession counts are rooted in the first subdivision of Section 1141 while the other two are in two other subdivisions, so that there are three.

I simply wanted to be clear, Mr. Stein.

Mr. Stein: I believe you misheard me, Mr.
384 Kern. What I said was "separate provisions of the Penal Law". Indeed, the first three types of counts found in the information are all found under subdivision one of Section 1141—

Justice Breslin: That is up to Count 159 inclusive.

Mr. Kern: That's what I want. That's fine.

Mr. Stein: Yes. —in two separate paragraphs thereof—publishing of certain printed material and hiring others. Publishing and hiring are worded together, but, indeed, under one subdivision.

Mr. Kern: Yes.

385

Justice Breslin: Section 11—General Business Law?

Mr. Stein: Section 330.

Justice Breslin: Of the General Business Law?

Mr. Stein: That's right.

I have additional copies of this Chart which I—perhaps we may mark as Court exhibits—which should make it easier to follow this trial.

Mr. Kern: No objection to that.

Mr. Stein: May we have this marked Court's Exhibits A, B, and C?

386

Justice Breslin: Court's Exhibits A, B, and C will be so marked.

(Court's Exhibits A, B, and C so marked.)

Justice Gassman: Mr. Stein, may I ask for the clarification of the Court,—

Mr. Stein: Yes, Your Honor.

Justice Gassman: —you said Count One to what? You got three—

Mr. Stein: One through sixty-two, Your Honor, which is what I am going to go into right now.

Justice Gassman: One through sixty-two.

Mr. Stein: Possession with intent to sell.

Justice Breslin: Sixty-three to 110 inclusive.

387

Mr. Stein: Deals with publishing. One-hundred-eleven through one-hundred-fifty-nine inclusive deals with hiring.

Justice Gassman: I see. Yes. And 159—

Justice Breslin: One-hundred-sixty to one-hundred-ninety-eight.

Mr. Stein: One-hundred-sixty to one-hundred-ninety-eight, failing to print publishers' and printers' names and addresses.

I think the chart is self-explanatory. There are a few things which lay behind the making

of the the chart which I want to indicate to the Court so they can better follow the evidence as it is presented.

Of course, to the left, the exhibit number may be put in.

On the second page of this chart there appears a black line which extends across the entire page. That line I intend as dividing all of the above items which are found at one particular location during a raid on that premises. That's 37 West 20th Street in New York County.

389 All of the items found on Page 1 and on Page 2, extending to the first black line, are titles for which we allege possession with intent to sell; and all of those titles were found at 37 West 20th Street.

Now, the next grouping of titles between the first black line and the second we also charge possession with intent to sell. However, these were found at a second location—a store entitled "The Publishers' Outlet Store".

Some of these titles which were found at the Publishers' Outlet Store—indeed, many of them

390 —were also found at the first location, at 37 West 20th Street.

What I have done, then, rather than citing the name of the titles twice, is to put two numbers on the first page. That is found under the column "possession". So that if you were going down that column to "House of Torture", you would see 14 and 40. That would mean that Count Number 14 charges possession with intent to sell for a book found on one day at 37 West 20th Street; Count 40 charges possession with intent to sell for another book—for the same book found under another day at Publisher Outlet, and so forth on down.

Now, there is one book called "Bondage Correspondence". That's separated by two black lines. That book is found at a third location. We do not allege possession with intent to sell, but we allege other things.

The three books at the bottom of Page 2 were found at still a fourth location.

"Queen Bee", on the very top of Page 3, was found at the Publishers Outlet on a day other than all those days about which we charge possession with intent to sell. This will be further elicited at the trial. 392

The last grouping of books, found at Publishers Outlet and 37 West 20th Street, we do not charge the books are pornographic. We charge that is a violation of the General Business Law, and we set them forth.

At this time, there are certain counts in the information, fourteen in all, which I ask to withdraw and to have them dismissed.

Justice Gassman: What counts are they?

Mr. Stein: These are Counts 33, 34, 35, 36, 54, 55, 56, 62, 94—

Justice Gassman: Wait a minute. 64, 65— 393

Justice Breslin: No.

Mr. Stein: No. Just 62.

Justice Breslin: 54—

Mr. Stein: 54, 55, 56, 62, 94, 105, 143, 154, 191, and 195. Fourteen in all.

Justice Breslin: All right. They will be dismissed.

Mr. Stein: Mr. Kern and I also have agreed to this: A great quantity of books were seized at the location 37 West 20th Street, some thousands of books. What I have done, at least for today, is to bring to court four copies of each title.

I intend to submit one in evidence, to give one to Mr. Kern, and to give additional copies to each of the other members of the bench.

I have agreed with Mr. Kern, if it meets with the approval of the Court, to mark in evidence only one copy, so that we can dispense with the time necessary for marking all four of them.

Justice Breslin: Is that agreeable?

Mr. Kern: That's marked for identification.

Mr. Stein: For identification. If they are received in evidence.

394 Mr. Kern: Yes.

Mr. Stein: In addition, Mr. Kern and I agreed that I might, prior to trial, mark that one copy for identification only; and I and the stenographer, Mr. Peterson, did that this past Friday,—

Mr. Kern: Yes.

Mr. Stein: —so that all the books which are to be offered in evidence have already been marked for identification only by Mr. Peterson and myself.

Justice Breslin: That's by agreement with Counsel?

396 Mr. Kern: Yes, certainly, to save the time of the Court.

Justice Breslin: All right. That's fine.

Mr. Stein: Just one word by way of the kind of evidence we hope to adduce here at the trial. I want to call to the Court's attention that the better number of books involved here are not the normal types of volumes which are prosecuted in pornography cases. They fall within the specific provisions of 1141 dealing with sadism and masochism.

There are, in addition, a great quantity of books which fall within the normal provisions of the pornography section of the Penal Law.

That's all I have to say.

Mr. Kern: May I, if the Court please, be clear as to one thing. Maybe I misunderstood or didn't quite make myself understood.

My understanding from the language in which the various counts are couched is that the counts as to possession—possession for the purpose of sale, and the publishing counts, are all rooted in subdivision one of Section 1141,—

Mr. Stein: That's correct.

Mr. Kern: —is that correct? I just wanted 398
no mistake about that. And the others in—well, in subdivision 330 of the General Business Law?

Mr. Stein: That's correct.

Mr. Kern: Thank you very much.

Justice Breslin: All right.

Mr. Stein: Inspector George Plansker.

GEORGE PLANSKER, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: All right. What is your name?

The Witness: Inspector George Plansker, 399
P-l-a-n-s-k-e-r, First Deputy Commissioner's Office.

*Direct Examination by Mr. Stein:*

Q. Inspector Plansker, how long have you been on the police force? A. Twenty-nine years.

Q. I call your attention, sir, to January 12th of this year, 1960. On that date, were you on active police duty? A. Yes, I was.

Q. And did you proceed to the premises 37 West 20th Street in New York County? A. Yes, I did.

400 Q. At approximately what time did you get there? A. Approximately one o'clock.

Q. And by whom, if anyone, were you accompanied? A. I was accompanied by five—five other police officers.

Justice Gassman: By whom?

The Witness: Five other police officers.

Q. Did you go to those premises pursuant to a search warrant? A. Yes, I did.

401 Q. And would you briefly describe the premises to us? A. We went to a basement of a loft building. There was an oil burner down there and a large room—a bunker—what I call a bunker room. It was a room about 25 by 30, all enclosed by brick except for one opening approximately 30 by 30 which had a metal door on it.

Q. What did you do in those premises, sir? A. I opened the metal door and peered inside of this room, and I observed therein a quantity of books and magazines.

Q. Did you do anything with those books? A. Yes, I did.

402 Q. What did you do, Inspector? A. I seized them all.

Q. Would you describe the process whereby you did this, briefly, please?

Mr. Kern: May I simply qualify the testimony of the witness and ask for the date of the search warrant, the court which issued the search warrant?

Justice Breslin: Yes.

Mr. Stein: I subpoenaed the search warrant from the record of the Magistrates' Court. It was delivered to me this morning. The search warrant came

from the Magistrates' Court of this county, the Felony Part, signed by Judge David Malbin; and the date which appears therein—well, the affidavit requesting it was signed on the 12th day of January, 1960; and since the raid was the same day—a search warrant dated the 12th day of January, 1960.

Mr. Kern: May I examine it, if the Court please?

Justice Breslin: Yes. 404

Did you secure the warrant?

The Witness: No. Lieutenant Dimler of my office did.

Justice Breslin: He went to the Magistrates' Court?

The Witness: The Felony Court, yes, sir.

Justice Breslin: All right. That was before you went up to these premises?

The Witness: Yes, Your Honor.

Justice Breslin: All right. Go ahead, Mr. Kern.

Q. Now, Inspector, you say you seized— 405

Justice Breslin: Wait. Do you want to question him, Mr. Kern?

Was this lieutenant with you—

The Witness: Yes, he was.

Justice Breslin: —the one who secured the search warrant?

The Witness: Yes.

Justice Breslin: Do you expect to call him as a witness?

Mr. Stein: Yes, I do.

Mr. Kern: Well, this is all, then, subject to my examination of Lieutenant—

Mr. Stein: Dimler.

Mr. Kern: —Lieutenant Dimler—

Justice Breslin: Yes.

Mr. Kern: —as to the adequacy of the search warrant.

Justice Breslin: Yes.

Mr. Stein: I may state for the record I don't think the adequacy of the search warrant has anything to do with the facts
407 in this particular case. Even if the search were illegal, the evidence seized therein is admissible.

Justice Breslin: Well, he has a right to inquire.

All right. Go on.

Q. Inspector, will you please tell us about this quantity of books which you removed from the bunker room in that basement? A. Two of my men went inside of this bunker room and passed the books out through the opening that I just spoke of where several lieutenants made note of
408 the various titles and an inventory of each title, and we wrapped them, and we put them in cartons and sealed the cartons.

Q. Now, Inspector, approximately how long did this entire process take? A. The 12th and the 13th.

Justice Breslin: Inspector, I think you indicated that this room, which you described as a bunker room, was about 25 by 30?

The Witness: That's right.

Justice Breslin: You mean feet?

The Witness: Yes, sir.

Justice Breslin: How high was this room?

The Witness: About 12 feet high.

Justice Breslin: All right. Now, you also indicated that there was one opening, through a metal door, the opening was about 30 by 30?

The Witness: That's right, Your Honor.

Justice Breslin: Inches?

The Witness: 30 by 30 inches.

Justice Breslin: All right. And it was through that door that you removed these books from the bunker room, is that right?

The Witness: That's right. 410

Justice Breslin: Go ahead.

Q. Inspector, how long did this process take? A. Approximately two days.

Q. Would you give us the times quickly, please? A. We went there about one on the 12th, and we quit at five. I put uniformed men in charge of it while I was gone, and we returned the next morning at nine A. M.; and we worked until about one-thirty P. M.

Q. Inspector, I am going to show you certain books now; and I am going to ask you to identify them. Inspector Plansker, at this time I show 411 you People's Exhibits 1 through 33 inclusive and ask you whether you can identify these?

Mr. Kern: Can we not save time by—I'm quite sure the inspector will testify that those are the books which were seized.

Mr. Stein: Fine, fine, Mr. Kern.

Q. Inspector, Exhibits 1 through 33 inclusive which are found in the carton before you now, were these all among the books which you seized at the premises on that date? A. Yes, they were.

412 *People's Witness, George Plansker, Direct*

Q. Inspector, I also show you Exhibits 34 through 42 for identification and ask you if these, too, were among the books seized in the premises on the date in question? A. Yes, they were.

Q. Inspector, I call your attention to December 29th of—Oh, one moment first. Inspector, would you tell us approximately—or exactly, if you can—how many copies of People's Exhibit 1 you removed?

413 Mr. Stein: Now, Mr. Kern, if you wish to stipulate at this time to the amount, I would merely read off the amount, if you wish to?

Mr. Kern: No, no, I can't do that.

Mr. Stein: Well, will you stipulate that the return of the search warrant contains certain amendments which you and I can read together?

Mr. Kern: If he can't testify from his recollection, then I submit to the Court I certainly will have no objection to his referring to any document for the purpose of refreshing his recollection.

414 Mr. Stein: In this case we will have to have this inspector give each book individually, which is what I attempted to avoid just a minute ago. I will have to ask the inspector about each book individually.

Mr. Kern: Well, the reasons why I can't agree as to the number of books—

Mr. Stein: Whatever you wish to do, Mr. Kerns.

Justice Breslin: All right. Go on.

Q. Inspector, will you tell us how many copies of People's Exhibit Number 1 for identification you seized? A. I will have to refer to some of my records.

Q. Fine. Go right ahead. A. "Chances Go Around"—

Mr. Stein: Do you have any objection to reading off the titles, Mr. Kern?

Mr. Kern: No, no. But may it appear that this witness is refreshing his recollection from some document he is examining? 416

Justice Breslin: Yes.

Q. "Chances Go Around"? A. One hundred fifty-eight copies.

Justice Gassman: One hundred fifty-eight of Exhibit 1.

Q. Exhibit 2, "Impact"? A. One hundred eighty-four.

Q. Exhibit 3 for identification, "Female Sultan"? A. Two hundred seventy-three.

Q. Exhibit 4 for identification, "Satin Satel- 417
lite"? A. Three hundred.

Q. Exhibit 5 for identification, "Her Highness"? A. Fourteen hundred and sixty-six.

Q. Exhibit 6 for identification, "Mistress of Leather"? A. Nine.

Q. Exhibit 7 for identification, "Educating Edna"? A. "Educating Edna", thirty-five.

Justice Gassman: Thirty-five?

The Witness: Thirty-five.

Q. Exhibit 8 for identification, "Strange Passions"? A. Two hundred.

418 *People's Witness, George Plansker, Direct*

Q. Exhibit 9 for identification, "The Whipping Chorus Girls"? A. Thirty-five.

Q. Exhibit 10 for identification, "Order of the Day" and "Bound Maritally"? A. Eighty-five.

Q. Exhibit 11 for identification, "Dance With a Dominant Whip"? A. Two hundred and twenty-five.

Q. Exhibit 12 for identification, "Cult of Spankers." In this case the back cover of the book has come off, and I am sure you won't have
419 any objection to removing the cover.

Mr. Kern: All right.

A. Fifty-five.

Justice Gassman: Fifty-five?

The Witness: Yes, sir.

Q. Exhibit 13 for identification, "Confessions"? A. Twenty-three.

Q. Exhibit 14 for identification, "The House of Torture"? A. Six hundred and fifty.

Q. Exhibit 15 for identification, "Bound in Rubber"? A. Four hundred and six.

420 Q. Exhibit 16 for identification, "Arduous Figure Training at Bondhaven"? A. Five hundred and fifteen.

Q. Exhibit 17 for identification. "Return Visit to Fetterland." A. Four hundred and thirty.

Q. Exhibit 18 for identification, "Fearful Ordeal in Restraintland"? A. One hundred and fifty.

Q. Exhibit 19 for identification, "Women in Distress"? A. Two hundred and fifteen.

Q. Exhibit 20 for identification, "Pleasure Parade, Volume 1"?

Justice Gassman: "Volume 1"? Your chart says, "Number 1".

Mr. Stein: "Number 1". I am sorry. It is "Number 1". I beg your pardon. It is "Volume 1" and "Number 1", I see.

A. Thirteen hundred and eighty.

Q. Exhibit 21 for identification, "Screaming Flesh"? A. Thirty-five.

Q. Exhibit 22 for identification, "Fury"? A. Six hundred and twenty-six.

Q. Exhibit 23 for identification, "So Firm and 422
So Fully Packed"? A. Four hundred and fifteen.

Q. Exhibit 24 for identification, "I'll Try Anything Twice"? A. Sixty-six.

Q. Exhibit 25 for identification, "Masque"? A. Eight hundred and seventy.

Q. Exhibit 26 for identification, "Catanis"? A. Two hundred and six.

Q. Exhibit 27 for identification, "The Violated Wrestler"? A. Three hundred and fifteen.

Justice Gassman: How many?

The Witness: Three hundred and fifteen. 423

Q. Exhibit 28 for identification, "Betrayal"? A. Eighty-five.

Q. Exhibit 29 for identification, "Swish Bottom"? A. Fifty-seven.

Q. Exhibit 30 for identification, "Raw Dames"? A. Two hundred and eight.

Justice Gassman: One hundred and eight?

The Witness: Two hundred and eight.

Justice Gassman: Two hundred and eight.

424 Q. Exhibit 31 for identification, "The Strap Returns"? A. Fifty.

Q. Exhibit 32 for identification, "Dangerous Years"? A. One hundred and fifteen.

Mr. Stein: May I indicate to the Court and Mr. Kern that for the remaining books I am going to introduce as having been found at these premises, we do not allege that they are pornographic. We allege merely violation of the General Business
425 Law. And these books are found on the last page of the chart.

Q. Exhibit thirty—

Mr. Kern: Thirty-three.

Mr. Stein: What do you have as the last exhibit?

Mr. Kern: Thirty-three.

Mr. Stein: May I see the chart? Oh, here it is.

Justice Breslin: You have one more there before the line—"Run Girl, Run Hard".

426 Mr. Stein: Yes. The next book we also allege as being pornographic, People's Exhibit 33 for identification, "Run Girl, Run Hard".

A. One hundred and sixty.

Mr. Kern: Four hundred and six?

The Witness: One hundred and sixty.

Q. People's Exhibit 34 for identification, "This Way Down"?

Justice Gassman: Title?

Mr. Stein: "This Way Down".

A. Fifty-nine.

Q. Exhibit 35 for identification, "The French Girl on the Stairs, Part 1". A. I have here, "French Girl on the Stairs", 1 and 2. Two hundred and twenty-four.

Q. And People's Exhibit 36 for identification, it is "French Girl on the Stairs, Part 2".

Justice Gassman: Well, wait a minute. Thirty-five. Is this 35 and 36, the number that you gave us?

Mr. Stein: 35 and 36 combined. 428

Justice Breslin: Two hundred twenty-four.

Mr. Stein: Two hundred twenty-four.

Q. People's Exhibit 37 for identification, "Smooth and Sassy"? A. Two thousand one hundred and seventy.

Justice Gassman: Three—?

The Witness: Two thousand one hundred and seventy.

Q. People's Exhibit 38 for identification, "Tattletales"? A. One thousand four hundred eighty- 429
five.

Q. Exhibit 39 for identification, "Look at Her Motor Turn Over"? A. Three hundred fifty-nine.

Q. Exhibit 40 for identification, "Sex Switch"? A. Nineteen hundred.

Q. Exhibit 41 for identification, "The Hollywood Spankers"? A. Three hundred and twenty.

Q. Exhibit 42 for identification, "Anecdotia Spankiana"? A. Three hundred and forty.

Q. Inspector Plansker, I call your attention to December 29th of 1959. On that date, were you on active police duty, sir? A. Yes, I was.

Q. And did you proceed to two separate premises? A. Yes, I did.

Q. Was one of those premises a book store called "The Publishers Outlet Store"—"Publishers Outlet, Inc." at 250 West 42nd Street in New York County? A. Yes, it was.

Q. Approximately what time did you get there? A. Approximately twelve-thirty, twelve-forty-five.

Justice Gassman: A.m. or p.m.?

Q. Who was with you?

The Witness: A.m.

Q. Who was with you, sir? A. Myself and four other officers.

Q. Would you please briefly describe the premises? A. It's a large store with numerous shelves and racks displaying books and magazines.

Q. What did you do there, sir? A. I confiscated a quantity of books and magazines.

Q. Now, approximately what time were you there, sir? A. We were there until approximately four o'clock.

Justice Breslin: That is 4 a.m.?

The Witness: Four p.m.

Justice Breslin: Four p.m.

The Witness: We walked in there at 12 noon, 12:30 noon.

Justice Breslin: You said 12:30 a.m.

Justice Gassman: P.m.?

The Witness: P.m.

Mr. Stein: May I have this cardboard carton marked People's Exhibit 34 sub 1 for identification?

Justice Breslin: It will be so marked.

(Cardboard carton marked People's Exhibit $34_1$ for identification.)

Mr. Stein: May I have the second cardboard marked 60 sub 1 for identification?

Justice Breslin: What number?

Mr. Stein: Sixty sub 1 for identification.

Justice Breslin: It will be so marked.

(Cardboard carton marked People's Exhibit $60_1$ for identification.)

Q. Inspector Plansker, can you please identify 434
for us if you can, People's Exhibit 34 sub 1 and People's Exhibit 60 sub 1 for identification? A. Yes. These are the books that I removed from the Publishers Outlet, 254 West 42nd Street.

Q. And these are all many books of different titles which you removed, is that correct, sir? A. That's correct.

Mr. Stein: May the record reflect that as to Exhibit 43 for identification there are 5 copies.

The Witness: "Columns of Agony". 435

Justice Gassman: What is the title?

Mr. Stein: "Columns of Agony".

Justice Gassman: Five.

Mr. Stein: Five. As to Exhibit 44 for identification, "The Tainted Pleasure", there is one copy.

Exhibit 45 for identification, "Intense Desire", there are 5 copies.

Exhibit 46 for identification, "The House of Torture",—

Justice Breslin: What number?

Mr. Stein: Forty-six.

436 *People's Witness, George Plansker, Direct*

Justice Gassman: What is the title of it?

Mr. Stein: "The House of Torture".

Justice Gassman: I haven't got it here.

Mr. Stein: That will be found—that was also found at the warehouse, so there will be separate numbers under the title of—

Justice Gassman: Have you got it on the list here, the chart?

437 Mr. Stein: Yes. It is Exhibit 14. It is also Exhibit 14, I believe.

Justice Gassman: "House of Torture".

Justice Breslin: You say how many were found?

Mr. Stein: Twenty, Your Honor.

Justice Breslin: Twenty.

Mr. Stein: Exhibit 47 for identification, "Bound in Rubber", seventeen.

Exhibit 48 for identification—

Justice Breslin: How many?

Mr. Stein: Seventeen.

Justice Breslin: Seventeen.

438 Mr. Stein: Exhibit 48 for identification, "Arduous Figure Training at Bondhaven"—

Justice Gassman: Wait a minute. "Arduous Figure—"

Mr. Stein: Yes, that also would be under the first group.

Justice Gassman: "Arduous Figure Training at Bondhaven"—

Mr. Stein: Is also Exhibit 16. It was also found at the warehouse—at Publishers Outlet, so it has not been placed twice—

Justice Gassman: Yes. How many have you got—16?

Mr. Stein: Twenty-five.

Justice Gassman: Why don't you mark it 16A instead of 48, so that we don't have to look around for it?

Mr. Stein: Well, it was found at a separate location. It would be the subject of separate testimony in part.

Justice Gassman: How many have you got? 440

Mr. Stein: Twenty-five, I believe I said.

Exhibit 49 for identification is "Return Visit to Fetterland". There are two copies.

Exhibit 50 for identification—

Justice Breslin: How many copies?

Mr. Stein: Two.

Justice Breslin: Yes. Go ahead.

Mr. Stein: 50 for identification is "Women in Distress". There are four copies.

Exhibit 51 for identification is "Pleasure Parade, Volume Number 4". There are four copies. 441

Justice Breslin: How many?

Mr. Stein: Four.

Justice Gassman: What was the number of that? 51?

Mr. Stein: That exhibit is Number 51, sir.

Justice Gassman: Four copies.

Mr. Stein: Exhibit 52 for identification is "Pleasure Parade, Volume Number 3", of which there are six copies.

Exhibit 53 for identification is "Pleasure Parade, Volume Number 2", of which there are six copies.

Exhibit 54 for identification is "Pleasure Volume Number 1", of which there are eight copies.

Justice Gassman: Hold that a moment, please. The same as Exhibit 20?

Mr. Stein: That's correct.

Justice Breslin: How many copies?

443 Mr. Stein: Eight copies.

Justice Breslin: Eight.

Mr. Stein: Fifty-four. And 55 for identification is "Sorority Girls Stringent Initiation", of which there are eighteen copies.

Exhibit 56 for identification is "Terror at the Bizarre Art Museum", of which there are fourteen copies.

Exhibit 57 for identification is "Screaming Flesh", of which there are—

Justice Gassman: What is the title?

Mr. Stein: "Screaming Flesh".

444 Justice Gassman: That is the same as 21?

Mr. Stein: Yes, Your Honor.—of which there are ten copies.

Exhibit Number 58 for identification is "Fury",—

Justice Gassman: That is the same as 22.

Mr. Stein: —of which there are three copies.

Exhibit 59 for identification, "Masque", of which there are two copies.

Justice Gassman: Wait a minute. Hold it.

Justice Breslin: Twenty-five, two copies.

Mr. Stein: Now, reading from People's Exhibit 60, for identification is a book entitled "Temptation", People's Exhibit 60 for identification. There are eight copies.

A series of cartoon sheets, Exhibit 61 for identification,—

Justice Gassman: What is the name?

Mr. Stein: "Peggy's Distress on the 446
Planet Venus".

Justice Gassman: Yes?

Mr. Stein: Sixteen copies.

Exhibit 62 for identification, "Ways of Discipline", eight copies.

Exhibit 63 for identification, "Mrs. Tyrant's Finishing School", two copies.

Justice Breslin: Two?

Mr. Stein: Two copies.

Exhibit 64 for identification, "Perilous Assignment", nine copies.

Exhibit 65 for identification, "The French Girl on the Stairs, Part 2",— 447

Justice Gassman: Wait a minute. Hold it.

Mr. Stein: —which is also found earlier, on the last page, I believe.

Justice Breslin: Part what?

Mr. Stein: Part 2. Six copies.

Justice Gassman: This is Exhibit 65?

Mr. Stein: That's correct, Your Honor.

Finally, there are a series of miscellaneous sheets in this exhibit which pertain in part to—which are pages from Exhibits 61 for identification through 64 for identification.

448 *People's Witness, George Plansker, Direct*

Justice Gassman: Sixty-one, two, three, and four. What are they?

Mr. Stein: Prints. These are miscellaneous sheets which fit only some of the pages. They are not complete copies of those exhibits.

Justice Gassman: Yes.

Mr. Stein: Exhibit 66 for identification, "Tattletales", also found on the last page,—

449 Justice Gassman: Exhibit 66, same as 38. Yes?

Mr. Stein: —one copy.

And 67 for identification, "Look at Her Motor Turn Over", also found on the last page—

Justice Gassman: Same as 39. How many?

Mr. Stein: —one copy.

Q. Now, Inspector Plansker, you say that on December 29th Publishers Outlet was one of the stores you proceeded to? A. That's right.

450 Q. What was the other premise? A. The other premise was the Midget Book Shop, 228 West 42nd Street.

Q. That's in the City and County of New York, is it not? A. Yes, it is.

Q. And did you proceed there with approximately the same men at approximately the same time as Publishers Outlet? A. That's right.

Q. What did you do there, sir? A. Confiscated a quantity of books and magazines.

Q. Would you very briefly describe those premises? A. It is a small store containing shelves and racks upon which were displayed books and magazines.

 451

Mr. Stein: May this carton be marked Exhibit 68 sub 1 for identification?

Justice Breslin: Subdivision 1. All right, it will be so marked.

(Carton marked People's Exhibit $68_1$ for identification.)

Q. Inspector, I show you Exhibit $68_1$ and I ask you—and I remove therefrom People's Exhibit 68 for identification, and I ask you if you identify it? A. Yes, I can.

Q. What is that, sir? A. It is a part of the— 452

Q. Was this seized from the book store? A. —material I removed from the Midget Book Shop.

Justice Gassman: What are those, Mr. Stein?

Mr. Stein: These are a series of cartoon sheets,—

Justice Gassman: Sheets of cartoons. All right.

Mr. Stein: —nine pages in all, entitled "Bondage Correspondence", of which there are ten copies. 453

Justice Gassman: Ten.

Mr. Stein: Ten copies.

Q. Inspector Plansker, during the time that you were at the Midget Book Store, did anything of an unusual nature occur? A. Yes. I was there about a half-hour inside the store when a man came to the door of the store, opened it—

Mr. Kern: Just a moment. May I ask which man?

Q. Which man, Inspector Plansker? A. Edward Mishkin.

Q. The defendant in the case? A. Defendant in the case.

Q. Go on, please. A. —came to the door; and Mr. Schenkman, whom we had under arrest at the time, went to the door and spoke to him. Mr. Schenkman then came back to me, and he asked for permission—

Mr. Kern: I will object to any conversa-
455 tion.

Justice Breslin: Yes.

Q. Don't tell us—

Justice Breslin: He came back and spoke to you, is that right?

The Witness: He came back and spoke to me.

Q. What did you then do, sir? What happened to the defendant? A. I then left the store and looked for the man who had opened the door. I walked west on 42nd Street looking for him, and when I reached the Publishers Outlet I
456 saw Mr. Mishkin inside.

Q. Did he make any statement to you or any other police officer in your presence concerning the property found in any of the two stores in question? A. No, he did not.

Q. Inspector Plansker, I call your attention to December 29th of 1959. On that occasion were you on active police duty, sir? A. Yes, I was.

Q. And did you proceed to the Midget Book Store at 228 West 42nd Street in New York County? Excuse me. This is what we have just described.

Justice Breslin: Yes.

Justice Gassman: Well, he said he did.

Q. On February 10th of 1960, were you on active police duty? A. Yes, I was.

Q. And at approximately twelve-thirty on that date, did you proceed to 1607 Broadway, premises known as "The Main Stem Book Store", in New York County? A. Yes, I did.

Justice Gassman: Main Stem—?

Mr. Stein: Main, M-a-i-n, Stem, S-t-e-m. 458

Q. Approximately what time did you get there, sir? A. About twelve-forty-five or one o'clock.

Justice Breslin: A. M. or P. M.?

The Witness: P. M.

Q. Were you accompanied by anyone? A. I was accompanied by three other police officers.

Q. Would you please briefly describe the premises? A. It is a small store containing shelves and racks displaying books and magazines.

Q. I show you People's Exhibit 68, for identification—

459.

Mr. Kern: May I ask the Court now instead of waiting for cross-examination whether these visits were made pursuant to the same search warrant, or were they separate search warrants for each visit?

Mr. Stein: Well, I would state for the record that when the premises 37 West 20th Street were visited that was pursuant to a search warrant.

Mr. Kern: I see.

Mr. Stein: When each of the three book stores were visited they were not visited pursuant to search warrants.

460 *People's Witness, George Plansker, Direct*

Mr. Kern: Now, I respectfully move that all the testimony given by this witness with reference to the search of the Midget Book Shop on West 42nd Street to which he just testified, be stricken from the record.

Justice Breslin: Denied.

Mr. Kern: I respectfully except.

Now, I respectfully object to the testimony about to be offered for the reason
461 that this was an illegal search, not warranted by any document issued by any court.

Justice Breslin: Objection overruled.

Mr. Kern: I respectfully except.

Q. I show you People's Exhibit 68, for identification, a carton, and ask you whether, other than Exhibit 68, you can identify the contents of this box? A. Yes, I can.

Q. What are they, sir? A. They were books that I seized at 1607 Broadway, the Main Stem Book Shop.

462 Q. The premises in question that you just described? A. Yes, that's right.

Mr. Stein: May the record reflect that for Exhibit 69 for identification, a book entitled "Woman Impelled", there are eleven copies.

For a book entitled "Eyewitness", Number 70 for identification, there is one copy.

Justice Galloway: What is the name of that 70?

The Witness: "Eyewitness".

Justice Galloway: All right.

Mr. Stein: For a book entitled "Stud Broad", S-t-u-d-b-r-o-a-d, Number 71 for identification, there are five copies.

Mr. Kern, you may inquire.

Mr. Kern: Just a few questions.

*Cross Examination by Mr. Kern:*

Q. Officer, your first visit was made to these premises at 37 West 20th Street, is that correct? 464
A. No, it isn't.

Q. Well, the first visit made pursuant to a search warrant was made at Number 37 West 20th Street? A. That's right.

Q. Prior to that, in December, on December the 29th, 1959, you went to Publishers Outlet, Inc., is that correct? A. That's correct.

Q. And on the same day, and after you had completed your visit at Publishers Outlet, you went to the Main Stem Book Store? A. That's right.

Q. Now, in December, 1959, or just before the time or at the time you went to visit Publishers 465
Outlet, you had no search warrant? A. No, I didn't.

Q. You went there with a number of police officers,— A. That's right.

Q. —is that correct? A. That's correct.

Q. And this was just a regular business place? A. That's right.

Q. And the door was open? A. That's right.

Q. And you walked in? A. Yes, sir.

Q. Was the door opened or closed? A. The door was open.

Q. This was in the month of December? A. It was open. By that I mean it didn't have a lock on.

Q. Well, all right. Then you just opened the door and walked in? A. That's right.

Q. And you didn't see the defendant there, did you? A. No, I didn't.

Q. Who was the owner of that store? A. I would have to refresh my recollection, but I think—

467 Q. Well, Publishers Outlet, is that correct? A. Publishers Outlet, that's right.

Q. There was a gentleman who you knew was the principal—the man in charge, is that right? A. That's right.

Justice Gassman: Mr. Kern, are you speaking about the Main Stem Store now?

Mr. Kern: No. I am talking about the first visit, Publishers Outlet, Inc.

Justice Gassman: Yes.

Q. And you seized a lot of books, is that correct? A. That's correct.

468 Q. The defendant here has no connection with that store, has he? A. At that time?

Q. Yes? A. I don't know whether he did or not.

Q. Well, in any event, he wasn't in charge of the store, is that correct? A. No.

Q. He wasn't in the store? A. No.

Q. There was someone who you talked to, is that correct? A. That's right.

Q. And whether you asked permission from him to take the books or not, he was the man you talked to? A. That's right.

Q. What's the man's name? Do you know? A. We took three that day, three men.

Q. All right. A. But I believe I spoke to Koskee (phonetic).

Q. Mr. Koskee? A. That's right.

Q. You arrested him, is that correct?

Justice Gassman: Wait a minute. How do you spell that?

The Witness: C-o-s-k-y, I believe.

Justice Gassman: Cosky?

The Witness: Cosky. 470

Q. You placed him under arrest? A. Yes, I did.

Q. And you arrested two others who were in the premises,— A. That's right.

Q. —is that correct? A. That's correct.

Q. All right. And as far as you know, of course, the defendant had no connection with that place?

Mr. Stein: I will object and ask that Mr. Kern qualify his statement as to whether the inspector knows at this time—

Mr. Kern: I will withdraw that. 471

Mr. Stein: —whether he knew on December 29th—

Mr. Kern: I will withdraw that.

Justice Breslin: It is withdrawn.

Q. Do you know whether on that day—No. I will withdraw that. I will withdraw the question.

Now, Inspector, will you go to the next visit, the one where you had a search warrant for premises 37 West 20th Street on January 12, 1960—is that correct? A. That's right.

Q. This was a loft building, is that correct? A. That's correct.

Q. It was not a book store? A. No, it wasn't.

Q. Not a retail store? A. No, it wasn't.

Q. Just a regular business building? A. That's right.

Q. Now, there is a gentleman who was located in that store of the name of—

Justice Galloway: Store?

Mr. Kern: That building. Sorry, Your
473 Honor.

Q. —in that building of the name of Levenberg, isn't that correct? A. That's right.

Q. Levenberg is a printer, isn't he? A. Yes, he is.

Q. And Levenberg is going to be—You have interviewed Levenberg as a witness in this case, is that correct? A. That's right.

Q. As a matter of fact, you spoke with him on Friday? Thursday or Friday? A. No, I didn't.

Q. All right. You know the district attorney
474 did, don't you? A. I don't know that.

Mr. Stein: Objection as to conversation of Thursday or Friday.

Justice Breslin: All right.

Q. Now, Inspector, Levenberg is a printer, is that correct? A. That's right.

Q. And Levenberg has, and had then, a lease to a certain portion of that building somewhere upstairs? A. That's right.

Q. And he also has a lease of a portion of the celler premises from which you removed books, is that correct? A. No.

Q. Well, didn't he have charge of that cubicle or that bunker, as you call it? A. The only way I could explain it, Mr. Kern—

Q. No, no. A. —is by quoting what he told me.

Q. No, no. Mr. Levenberg was a printer in that building? A. That's right.

Q. This was a storeroom downstairs? A. It wasn't used as a storeroom.

Q. Well, it was used by Levenberg as a storeroom, wasn't it? A. He used it to hide these 476
books.

Mr. Kern: Well, I move to strike the word "hide". I think that's a conclusion, the word "hide".

Justice Breslin: Strike that out.

Q. He used it to keep things there, is that correct? A. That's right.

Q. All right. When you got to the premises 37 West 20th Street, New York City, this defendant wasn't there? A. No, he wasn't.

Q. You had never seen him in that place,— A. No. 477

Q. —is that correct? A. No, sir.

Q. Now, coming back to the first place, had you had that place—the visit in December—the visit on December 29th—Publishers Outlet, Inc. —had you had that place under observation for any period of time before you actually entered the premises on that date? A. Yes, we did.

Q. For how long a time? A. At various times.

Q. Over what period? A. Over a period of several weeks.

Q. All right. Now, as to your next visit, at 37 West 20th Street, had you had that place under observation? A. Yes, we did.

Q. For how long? A. Two or three weeks.

Q. Now, the portion of this building, 37 West 20th Street, that you had under observation for two or three weeks, was what? Which particular portion? The whole building itself? The cellar? Or the premises occupied by Printer Levenberg? A. We had Levenberg's premises under surveillance.

Q. And what floor was Levenberg located on? A. Ninth floor.

479 Q. And did you have operatives—or did you have police officers up on the ninth floor? A. No, we didn't.

Q. Well, you had them outside, you mean? A. That's right.

Q. This was a big loft building? A. That's right.

Q. Great many tenants, isn't that true? A. Yes, sir.

Q. People coming in and out? A. Yes.

Q. And you had your men stationed on the sidewalk and in the street? A. That's right.

480 Q. All right, now, the next visit, to the Midget Book Shop, on West 42nd Street; and this was also—this goes back to December 29th. Now, is the defendant the owner of that place? A. I do not know.

Q. Who is the owner? Do you know? A. We arrested a man by the name of William Schenkman.

Q. Mr. Schenkman was in charge there? A. That's right.

Q. He is the man you talked to? A. That's right.

Q. Was the door opened or closed? A. It was closed.

481 Q. Not locked? A. Not locked.

Q. And you walked in and you talked with Schenkman? A. That's right.

Q. And you removed all of these books, is that correct? A. That's correct.

Q. Never on any of these days on which—or with reference to the days you refer, the days on which you walked in and removed books, you never in any one of these three places saw the defendant in charge—managing any one of these places, or in charge of any one of these places, 482 is that correct?

Mr. Stein: I will object as that calls for a conclusion. The witness has described exactly what he saw—the man coming to a door, holding a conversation, and walking out.

Mr. Kern: Oh, well, I am talking about managing. He might have been a customer. I am very explicit, I think, in my question—in charge of the place. Now, I think this officer knows what I mean.

483 Justice Breslin: You didn't see this defendant in any of these places, is that correct?

The Witness: No, I did not.

Mr. Kern: That's all.

Justice Breslin: We will sustain your objection.

Justice Breslin: Yes.

Justice Gassman: You see, you are asking him as to whether he saw the defendant in charge. Now, that's a conclusion.

As Judge Breslin pointed out, the defendant might be in Yonkers. A person might be elsewhere and still be in charge or in control of the business.

Mr. Kern: Yes, that's correct, but Judge Breslin asked him if he saw the defendant;—

Justice Breslin: Yes.

Justice Gassman: And he said he didn't see the defendant.

485 Mr. Kern: He said, "No."

Justice Gassman: That's right.

Mr. Kern: Then I am willing to let the answer stand.

Justice Breslin: Yes.

Justice Gassman: Yes.

Justice Galloway: That is in the record.

Mr. Kern: Yes, but then Your Honor said the objection was sustained.

Justice Galloway: To your question.

Mr. Kern: Well, I will withdraw my question and let Your Honor's question

486 and answer stand.

That's all. Nothing else of this witness.

Mr. Stein: Thank you very much.

Justice Breslin: Are you through with this witness?

Mr. Stein: Yes.

Justice Breslin: All right. Step down. We will take a three minute recess.

(Recess.)

*People's Witness, Edward Gurnewald, Direct* 487

Mr. Stein: Detective Edward Gurnewald.

EDWARD GURNEWALD, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: Name, shield number, and assignment?

The Witness: Detective Edward F. Gurnewald, G-u-r-n-e-w-a-l-d, Shield 372, Police Commissioner's Confidential Investigating Unit.

488

*Direct Examination by Mr. Stein:*

Q. Detective Gurnewald, on December 30, of 1958, were you on active police duty on that date? A. I was.

Justice Gassman: '58, was that?

Mr. Stein: '58, yes, Your Honor.

Justice Gassman: Yes.

Q. And did you proceed to the premises 254 West 42nd Street, a store called the Publishers Outlet Book Store? A. I did.

Q. What did you do there, sir? A. I entered the store and observed on display therein— 489

Mr. Kern: Just one minute. I respectfully object to this testimony on the ground that it is not within the scope of this information.

Justice Breslin: '58?

Mr. Stein: Yes, Your Honor. I am alleging that the defendant was the publisher of a certain book. That book was found in the book store. I am not alleging that the defendant sold it in that store at all, but I merely want to get the book

physically into evidence. The book was picked up in the store on this occasion. I am not charging the defendant with possession with intent to sell on that date. I'm charging him with publishing this book.

Mr. Kern: Well, there's no allegation that any crime was committed in 1958.

Mr. Stein: No, there was not—

Mr. Kern: I object to it.

491 Mr. Stein: Just a moment. There is, of course—People—Count Number 198.

Justice Breslin: August 12, 1958. We will take it. Come on.

Mr. Kern: Exception.

Q. Would you tell us, Detective Gurnewald, what you did in those premises on the day in question? A. I entered the book store and observed on display therein copies of "Queen Bee" book.

Q. "Queen Bee"? A. Yes, sir.

Q. What did you do, sir? A. I took one book
492 over to the man who was at the cash register and purchased the book for the sum of five dollars.

Q. And did you do anything else, sir? A. Yes. In addition to that, I seized twenty-one of the same titled book which was also on display in the store.

Mr. Stein: I ask that this container be marked People's Exhibit 72 sub 1 for identification.

Justice Breslin: Seventy-two, one,—

Mr. Stein: Sub one.

 493

Justice Breslin: —for identification. It will be so marked.

(Container marked People's Exhibit $72_1$ for identification.)

Q. Officer, will you look at this container and tell me if you can identify it? A. The container? Yes, I can.

Q. What is on the inside of it? A. Copies of "Queen Bee" book.

Q. The books you seized on the day in question? A. Yes, sir. 494

Mr. Stein: People's Exhibit 72 for identification is a book entitled "Queen Bee". There are twenty-one copies of the book in $72_1$ for identification.

Justice Breslin: And they were seized on December 30th of 1958?

Q. Is that correct, sir? A. Yes, sir.

Mr. Stein: You may inquire.

*Cross Examination by Mr. Kern:*

495

Q. Well, just this question, Detective: On this day in 1958 when this happened, was the defendant in the store? A. Not that I know of. I don't recall.

Q. Well, you didn't see him there, did you? A. No, sir.

Q. He wasn't anywhere in the place at the time? A. I didn't observe him, no, sir.

Justice Breslin: Did you make an arrest there?

The Witness: Yes, sir, I did.

Justice Breslin: What is the name of the person arrested?

496 *People's Witness, Herbert C. Hurley, Direct*

The Witness: Herman Schenkman.
Justice Breslin: Schenkman?
The Witness: Yes, sir.
Justice Breslin: All right. Step down.

Mr. Kern: No further questions.

Mr. Stein: Step down.
Detective Herbert Hurley. Will you have him come in, Detective Gurnewald?

497

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HERBERT C. HURLEY, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: Name, shield number, and assignment?
The Witness: Detective Herbert C. Hurley, Shield Number 2354, assigned to the district attorney's office, New York County.
Justice Gassman: How do you spell your second name?
The Witness: H-u-r-l-e-y.

498

*Direct Examination by Mr. Stein:*

Q. Detective Hurley, I call your attention to January 22nd, this year, 1960. On that date, did you have occasion to meet one Louis N. Field? A. I did.

Justice Gassman: Louis N. who?
Mr. Stein: Field, F-i-e-l-d.

Q. And who is he, sir? A. He is an attorney.

Q. Do you know whom he represented at the time you met him? A. He represented a party by the name of Norman Levenberg.

Q. And—

Justice Gassman: Wait a minute. Represented whom?

The Witness: Norman Levenberg.

Justice Gassman: Levenberg.

Q. And on that date, January 22nd, you met him where, sir? A. I met him at 220 West 42nd 500
Street, Room Number 707.

Q. At approximately what time? A. At approximately three, three-thirty p. m.

Q. Did you have a conversation with him? A. I did.

Q. As a result of that conversation, did anything take place? A. Yes. He made a phone call. Then, after the phone call, he turned over a bunch of papers in a shopping bag to me.

Justice Gassman: Who did?—Field?

The Witness: The attorney—Field.

Mr. Stein: May I have these cardboards 501
marked for identification as follows: People's Exhibits 1A through 1L, a series of ten cardboards.

Justice Gassman: What were those, the contents of the carton?

Mr. Stein: Well, these—

The Witness: Partially. This is partially the contents of a shopping bag which defendant Field turned over to me.

Mr. Stein: "Attorney".

Justice Breslin: How many have you got?

Mr. Stein: This series is a series of scene drawings which I ask be marked 1A through 1L for identification.

Justice Breslin: Oh, there was ten.

Mr. Kern: May—Of course,—

The Witness: Should be twelve.

Mr. Kern: —I understand these are all being marked for identification and not
503 in evidence, but it seems to be obviously so apparent that these documents can't possibly be received in evidence at any time where they are physically—especially under these circumstances—they are physically turned over by the lawyer the name of Field, an attorney for one of the district attorney's witnesses, to this detective. Now, how can they possibly be binding upon this defendant?

Mr. Stein: I promise to unravel that mystery to the Court as this case pro-
504 gresses.

Justice Breslin: All right. They will be marked 1A to 1J if there are ten of of them.

Mr. Stein: I am sorry, Your Honor. There are twelve of them. Twelve.

Justice Breslin: Yes. 1A to 1L inclusive.

(So marked.)

Q. Detective Hurley, I show you Exhibits 1A through 1L for identification and ask you whether

these were among the items which Attorney Field turned over to you on the day in question? A. They are.

Mr. Stein: May we have this cardboard marked Exhibit 4A for identification?

Justice Gassman: What number?

Mr. Stein: 4A.

Justice Breslin: 4A. So marked.

(People's Exhibit 4A for identification, so marked.)

Mr. Stein: A second cardboard marked 506
21A for identification.

Justice Gassman: What number?

Mr. Stein: 21A.

Justice Breslin: 21A. Mark it.

(People's Exhibit 21A for identification, so marked.)

Mr. Stein: A third cardboard marked 23A for identification.

Justice Breslin: So marked.

(People's Exhibit 23A for identification, so marked.)

Mr. Stein: A fourth cardboard marked 507
23B for identification.

Justice Breslin: So marked.

(People's Exhibit 23B for identification, so marked.)

Mr. Stein: A fifth marked 24A for identification.

Justice Breslin: Mark it.

(People's Exhibit 24A for identification, so marked.)

Mr. Stein: A sixth marked 25A for identification.

Justice Breslin: Mark it.

(People's Exhibit 25A for identification, so marked.)

Mr. Stein: Another marked 25B for identification.

Justice Breslin: Mark it.

(People's Exhibit 25B for identification, so marked.)

Mr. Stein: Another marked 26A for identification.

Justice Breslin: Mark it.

509 (People's Exhibit 26A for identification, so marked.)

Justice Breslin: How many more do you have?

Mr. Stein: Just a few. About five.

Justice Galloway: How many more?

Mr. Stein: About five more.

Justice Breslin: All right. Mark these all as requested.

Mr. Stein: Another marked 28A for identification.

(People's Exhibit 28A for identification, so marked.)

510 Justice Gassman: Mr. Stein, is it the statement of the witness that these are all the papers turned over to him by Mr. Field?

Mr. Stein: No. He said these appear among the papers turned over to him by Mr. Field.

Justice Gassman: Among the papers?

Mr. Stein: Yes.

Justice Gassman: All right.

Mr. Stein: Another marked 29A for identification.

(People's Exhibit 29A for identification, so marked.)

Mr. Stein: Another marked 30A for identification.

(People's Exhibit 30A for identification so marked.)

Mr. Stein: Another marked 34A for identification.

(People's Exhibit 34A for identification, so marked.)

Mr. Stein: To this is attached a piece of 512
colored celluloid, to be marked 37A for identification.

(People's Exhibit 37A for identification, so marked.)

Mr. Stein: Another to be marked 60A for identification.

Justice Breslin: Sixty?

Mr. Stein: 60A.

Justice Breslin: "A".

Mr. Stein: In this case, Mr. Kern, a sheet of paper came along with this which has since been torn off. I will just clip it on to the exhibit. 513

Mr. Kern: Perfectly all right.

(People's Exhibit 60A for identification, so marked.)

Mr. Stein: Another to be marked 70A for identification.

Justice Breslin: Seventy?

Mr. Stein: Seven-zero-A.

(People's Exhibit 70A for identification, so marked.)

Mr. Stein: Still another to be marked 71A for identification.

Justice Breslin: 71A.

514 *People's Witness, Herbert C. Hurley, Direct*

(People's Exhibit 71A for identification, so marked.)

Mr. Stein: And finally, one to be marked 72A for identification.

(People's Exhibit 72A for identification, so marked.)

Q. Detective Hurley, I show you the items which have just been marked for identification, exclusive of Exhibits 1A through 1L, which I have already shown you; and I ask you whether
515 these exhibits for identification are among the items turned over to you by the Attorney Field on the day in question? A. They are.

Q. Now, Detective Hurley, you testified that Mr. Field gave you other items, is that correct? A. That is correct.

Mr. Stein: I ask that this envelope be marked People's 73 for identification.

Justice Breslin: Mark it.

(People's Exhibit 73 for identification, so marked.)

Mr. Stein: I ask that three slips of pa-
516 per found within this envelope be marked People's 73A, B, and C for identification.

Justice Breslin: All right. So marked.

(People's Exhibits 73A, 73B, and 73C for identification, so marked, respectively.)

Q. Detective Hurley, I show you People's Exhibits 73A, B, and C for identification; and I ask you whether Attorney Field turned these over to you on the day in question? A. He did.

Mr. Stein: You may inquire.

*People's Witness, Norman Levenberg, Direct* 517

*Cross Examination by Mr. Kern:*

Q. The defendant wasn't there at the time that you saw the attorney Field, was he? A. No, sir.

Mr. Kern: Nothing else.

Mr. Stein: Thank you. Will you ask Norman Levenberg to come in, please?

Justice Breslin: Wait a minute. I think this will be a good time to take a recess 518 until two-ten.

(Luncheon recess.)

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Mr. Stein: Are you ready?
Justice Breslin: Go ahead.

NORMAN LEVENBERG, having been called as a witness, was first duly sworn, and testified as follows: 519

Court Officer: All right. Be seated. Please keep your voice up. What is your name?

The Witness: Norman Levenberg, L-e-v-e-n-b-e-r-g.

Court Officer: Keep your voice up loud. What is your address?

The Witness: Seven Evans Avenue, Farmingdale, Long Island.

Court Officer: Business or occupation?

The Witness: Printer.

Court Officer: Keep your voice up.

520 *People's Witness, Norman Levenberg, Direct*

*Direct Examination by Mr. Stein:*

Q. Mr. Levenberg, I will ask that you speak up so that I can hear you at the point I am standing at now. Now, you stated that you are a printer, is that right, sir? A. Correct.

Q. What type of printing do you do? A. Photo offset.

Q. And for approximately how long have you worked as a printer? A. Ten, twelve years.

Q. Do you know the defendant in this case?
521 A. Yes.

Q. Approximately how long do you know him? A. Well, I first met him about twelve years ago.

Justice Gassman: Will you speak up louder, please. Twelve years?

Q. Twelve years ago? A. Yes.

Q. And have you ever done any work for him? A. Yes.

Q. What type of work? A. Printing.

Q. At this time I show you People's Exhibits 1 through 72 for identification, and I ask you whether you can identify these? Can you iden-
522 tify these 72 exhibits, sir? A. Yes.

Q. What can you tell us about them? A. Well, I printed all these here. These I didn't print.

Justice Gassman: You did what? Speak up loud.

The Witness: I printed all these books here.

Justice Gassman: You printed all these books?

The Witness: Yes. Right.

Q. And you did not print— A. These I didn't print.

Q. —these three I am holding now? A. That's right.

Justice Breslin: Those are numbers what?

Mr. Stein: Number 31 for identification—

Justice Gassman: 31.

Mr. Stein: —31, "The Strap Returns", 32, "Dangerous Years", 33, "Run Girl, Run Hard".

Q. For whom, sir, did you print each of these books?

524

Mr. Kern: I object to that. I object to the form of the question.

Justice Breslin: Sustained.

At whose request did you print these books?

The Witness: I printed these books for Mr. Mishkin.

Mr. Kern: No. I object to—

Justice Breslin: Go ahead.

Mr. Kern: I thought the Court sustained my objection.

Justice Breslin: I did. I asked him another question. 525

Mr. Kern: Oh, I didn't hear the question.

Justice Breslin: Withdrawn.

At whose request did you print these books?

The Witness: Mr. Mishkin's request.

Q. That's the defendant in this case, is that correct? A. Correct.

Justice Breslin: By the way, where is your place of business?

The Witness: Well, right now I am located at 125 West 21st Street—125 West 21st Street.

Justice Breslin: Before that, where were you located?

The Witness: Well, when I printed up these books I was at 37 West 20th Street; a few of these books, I was at 250 West 49th.

Q. When you were at West 20th Street—37 West 20th Street you operated under a corporate name, did you not? A. Well, it wasn't a
527 corporate name there.

Q. Well, you had a name for your establishment, didn't you? A. Well, I was "Norman Offset".

Q. Norman Offset. A. Offset.

Q. And for what period of time did you work at 37 West 20th Street? A. September of '57 until about—I would say, about May—September of '57 and up until about May of '59.

Q. And prior to that time, had you done any printing under any other name? A. Prior to that time, I printed under Marsee (phonetic)
528 Offset.

Q. Marsee Offset? A. Correct.

Q. And any other name? A. Well, Marsee Offset.

Q. Now, I would like you again, please, raise your voice so we can all hear you, Mr. Levenberg. And I want you to describe for us the arrangements that were made between you and the defendant for the printing of the books which you have identified. A. Mr. Mishkin—

Mr. Kern: May I ask—I object to this unless the time and place of this conversation is stated.

Justice Breslin: Yes. Fix the time.

Mr. Stein: Well, Your Honor, may I do this? I intend to ask the witness as to the date at which he printed each one of these books. I intend to ask him as to the quantity that he printed as to each book. However, I thought, to facilitate time, I would ask him general questions as to the general procedure followed with the defendant rather than repeat it as to each of approximately 72 books. 530

Justice Breslin: All right. Suppose you proceed. Try to get the time fixed as nearly as you can.

Justice Gassman: Pardon me. Before you go on with your question—

—You say that you moved out of 20th Street in May, '59?

The Witness: Approximately. I wouldn't know. I wouldn't remember exactly the time. It was approximately May of '59.

Justice Gassman: Were you there in December of '59? 531

The Witness: Yes, I was there in December of '59.

Justice Gassman: Well, you said you moved out in May, '59. Now, which is it?

The Witness: Oh, wait a minute. Sorry. December of '59—No, I wasn't there in December of '59.

Justice Gassman: You were not there?

The Witness: No.

Justice Gassman: Where was your place of business in December, 1959?

The Witness: December of 1959, I would have to say 250 West 49th even though I actually wasn't up there any more. My press was still up there, I believe, but I wasn't up there.

Justice Gassman: On West 49th Street?

The Witness: Yes, 250 West 49th.

Justice Gassman: Where were you on January 12, 1960, this year?

The Witness: January 12th?

Justice Gassman: Yes?

533 The Witness: I was up at 250 West 49th.

Justice Gassman: All right.

Mr. Stein: I am not sure, Your Honors. Did you want me to question the witness as to each book specifically?

Justice Breslin: No, no.

Mr. Stein: All right.

Q. Would you describe, when you entered into arrangements for the printing of the books which you just testified you printed at the request of the defendant—

534 The Witness: Pardon me. Could I give—Did you say January of '59?

Justice Galloway: January, '60.

Justice Breslin: '60.

The Witness: Yes. January, '60, I was up at 250 West 49th.

Q. When you entered into arrangements for the printing of books at the defendant's request, those books you have already identified, did you follow the same procedure for the printing of each of those books? A. Yes.

Q. Would you describe what that procedure was, sir? A. Mr. Mishkin would call me at my

place of business and tell me to come down to his store, that he had a job he wanted me to do.

Q. What store would that be, sir? A. Well, usually it was Publishers Outlet.

Q. At 254 West 42nd Street? A. Right.

Q. Now, you say he told you to come down to his store. How do you know it was his store? A. He called it his store.

Q. He told you that, himself? A. Yes. He referred to it as "my store". 536

Q. Did the defendant ever tell you to come down to any other store? A. Well, for a period there he—

Mr. Kern: Well, if the Court pleases, I think this is very material; and the district attorney's leading is, I believe, prejudicial to the defendant.

Justice Breslin: Yes. Don't lead.

Q. All right. Go on. In just your own words, describe the procedure. A. You want me to tell you about the stores—the different stores that he called me—I went down to to pick up the 537 books?

Q. Tell us the procedure that you followed for the printing of these books. A. He called me down to the store. I would go down there. He would hand me either a manuscript or he would hand me a previously-printed book. Now, if he handed me a manuscript, I would take that manuscript and give it to a typesetter, who would set the type up in the same size pages that I was going to print it in.

Q. When he handed you a manuscript, would he hand you a typewritten manuscript? A. The manuscript would be a typewritten manuscript.

Q. Approximately what size would it be? A. The typewritten manuscript would be on standard paper—eight-and-a-half, eleven.

Q. You say you then sent that to a typesetter? A. I sent it to a typesetter. He would set it up in five-and-a-half, eight-and-a-half paper.

Q. Is that, sir, about the approximate size of the page found, for example, on People's Exhibit 72 for identification? A. That's five-and-a-half —that's five-and-a-half, eight-and-a-half.

539 Q. What would you do when you got that back from the typesetter? A. When I would get the stuff back from the typesetter it would be all set up ready for the camera. I would photograph it, then strip up the negatives into a book form, print them on the press on flat sheets; and then I would give it to a binder who would make it up into a book.

Q. You stated that on some occasions Mr. Mishkin gave you a book that had already been printed? A. That's right.

Q. What would you do in that case? A. In that case I didn't have to bother with the type-
540 setter. All I would do is pull the book apart and photograph it and go through the same procedure.

Q. When Mr. Mishkin gave you a manuscript, would anything else be done? A. Well, if he gave me a manuscript, he would have to give me a little information to go along with it.

Q. What would he do, sir? A. Well, he would tell me what price to put on the cover. He would give me a picture for the cover.

Q. Would he do anything else? A. And he would tell me what—usually, if it was a thin manuscript, if there wasn't too much to it, he told me to try to make it a little thicker.

Q. How would you do that, sir? A. Well, there's two ways of doing it. You could use a heavier type of paper; that would make it thicker automatically. And the other thing you could do is by spacing the typewritten copy inside. In other words, if you put the—if you spaced it out big spaces in between the lines, you would end up with a thicker book.

Q. And you would give these instructions, presumably, to the typesetter, is that right? A. Right. 542

Q. Did Mr. Mishkin ever give you any other instructions concerning the printing of these books that you remember? A. Well, he—yes. Here it say "Rainbow Publishing Company, Brooklyn, New York." He would tell me to put down a publisher's name on the back.

Q. He would tell you to put a publisher's name on the back? A. Correct.

Q. And did he always do this, sir? A. Did we always do it?

Q. Did he always tell you to put a publisher's name on the back of a book? A. Well, after the first couple of books—I remember there was a 543 time when I wasn't doing it, and then he told me, he said, "It's got to have a publisher's name on there, so from now on put a publisher's name on there."

Q. And would he always tell you the name to put on? A. Couple of times he gave me the publisher's name and address to put down, but after a while he just told me, "Make up any name and address."

Q. "Make up any name and address"? A. Right.

Q. When you say "address", what do you mean by that? A. Like here, it says "Brooklyn,

New York". Sometimes we put down London or Paris. No definite address. Just a town—

Q. Did— A. —or city.

Q. Did Mr. Mishkin ever tell you to put down his name and address on any of these books? A. No.

Q. Did Mr. Mishkin ever tell you to put down "Published by Edward Mishkin"? A. No.

Q. Did Mr. Mishkin ever tell you to put down "Published by Publishers Outlet"? A. No.

545 Q. Did Mr. Mishkin ever tell you to place on any of these books the name of any corporation, firm or other name that he told you, or you knew, he was associated with? A. No.

Q. How would you be paid? A. After I would deliver—I would deliver some of the books to the stores, and then he would pay me.

Q. Which stores would you deliver them to? A. Well, the last—I would say, the last year-and-a-half or the last year at least—

Justice Gassman: What?

Q. Extending to what— A. —the last year—

546 the last year that I did—because—in other words, it is all according to what store he was in at the time.

Q. From the period March 9th of 1958 to the period March 9th of 1960, the date the defendant was arrested, to what stores would you make deliveries? A. After I finished with a job, I would take fifty books to the Publishers Outlet and fifty books to the Midget Book Shop.

Q. These are the only deliveries that would be made to stores, is that correct? A. Correct. The rest would go into the warehouse.

Q. Now, you mentioned earlier, sir, that at times the defendant would give you drawings.

What do you mean by that? A. Well, on these books here you have pictures on the covers. You have to have a picture for the cover, so he would give me the drawing to go along with it.

Q. What would you do with the drawing when he gave it to you? A. We would photograph it and print it up, make a plate and print it.

Justice Gassman: Tell me, where was the warehouse? You speak about the balance of the books being sent to the warehouse. Where was that? 548

The Witness: Well, there's two. I had two warehouses for him.

Justice Gassman: You mean your warehouses?

The Witness: They weren't mine—my warehouses; they were his warehouses.

Mr. Stein: I wanted to develop that rather fully, Your Honor.

Justice Gassman: I beg your pardon?

Mr. Stein: I wanted to develop that fully at a different time.

Justice Gassman: I mean why not finish with it once you speak about it, so we 549 can get to it and not get lost later on.

Where were the warehouses?

The Witness: The first warehouse that I got for him was at 44 West 17th Street. It was a basement warehouse. And—

Q. Up to what time did you have that warehouse for the defendant? A. We got that—I think I got that warehouse at about, I would say, the early part of '58 I got that warehouse for him.

550 Q. And until when did the defendant have that warehouse? A. I think we had that warehouse for about six months.

Q. Up to approximately when? Do you recall? A. It would be the middle of '53.

Q. What happened in the middle of '58 that caused you to do something about that warehouse? A. He had a fellow working for him that used to take care of the warehouse for him; and this fellow came over to me and said, "Norman, do me a favor and get—"

551

Mr. Kern: No. I object to any conversation.

Justice Breslin: Yes. Sustained. Strike that out.

Q. Did something take place with the warehouse that caused you to no longer use it? A. Well, this fellow took care of the warehouse—

Mr. Kern: No. I object.

Justice Breslin: Just "yes" or "no".

Q. Don't tell us— A. Yes.

552 Q. Did something happen? A. Something took place.

Q. Don't tell us what someone told you. But was there something connected with the warehouse that caused you not to use it any more? A. The warehouse had rodents in it.

Q. Rodents?

Justice Galloway: I couldn't hear. What?

Mr. Stein: Had rodents.

The Witness: Rodents.

Justice Galloway: Rodents. All right.

Q. What did you do after that? A. We rented another warehouse.

Q. Who is "we"? A. Well, at that time I had an agreement with—I was working with—with another fellow named Max Dichter.

Mr. Kern: Move that be stricken out, "We rented another warehouse." And I object to this. Move this be stricken out.

Justice Breslin: Yes. Strike it out.

Q. Mr. Levenberg, listen closely to what I ask you. You had a warehouse in West 17th Street 554 in which the defendant stored certain books, is that correct? A. Correct.

Q. At one time, because of rodent infestation in that warehouse, you no longer used that particular warehouse, is that correct? A. That's correct.

Q. Was another warehouse obtained? A. Yes.

Q. For whom? A. For Mr. Mishkin.

Q. As a result of what—any agreements or negotiations between you and he? A. He asked me to get him another warehouse.

Q. Tell us what happened. A. Well, I went 555 up; and I got—I got a warehouse in the same building I had my shop.

Q. Is this 37 West 20th Street? A. 37 West 20th Street.

Q. And that was approximately the middle of what year, sir? A. Middle of '58.

Q. And did you enter into any arrangement with Mr. Mishkin for the maintenance of that warehouse? A. At the beginning of every month Mr. Mishkin would give me one hundred dollars cash, which I would pay to the landlord.

Q. What did Mr. Mishkin tell you to do about that warehouse? A. He told me to put the books in there.

556 Q. Books which you would have printed for him, is that correct? A. That's right.

Q. And you previously testified when you ran off the printing you would deliver approximately fifty to Publishers Outlet, is that correct? A. And fifty to the little book shop.

Q. What's the name of the little book shop? A. Midget Book Shop.

Q. Midget. And the rest you would store in one of these two warehouses, is that correct? A. Right.

557 Q. Now, Mr. Mishkin told you to make deliveries at times to the Midget Book Store, is that right?

Mr. Kern: No, if the Court please, I object.

Justice Breslin: Yes. Don't lead.

Mr. Kern: I haven't objected, but Counsel is leading.

Justice Breslin: Yes. Don't lead him. Sustained.

Justice Gassman: Before you drop the ware-
558 house, how long did you maintain the warehouse at West 20th Street?

The Witness: I maintained the warehouse, well, up until, I would say about a month—let's see—I would say about until about November of '59.

Justice Gassman: Did you have the warehouse there in January of 1960?

The Witness: January, 1960? No. I had moved out—I had moved the books out of there.

Justice Gassman: When did you move the books out?

The Witness: In about November of '59.

Q. When you had the books at 37 West 20th Street, what part of 37 West 20th Street did you initially have them in? A. I had them in Room 908.

Q. Room 908? A. Right.

Q. You moved them in November of 1959, is that correct? A. I'm not exact about the dates, but I would say it is approximately November of '59.

Q. '59. Why did you move them?

Mr. Kern: I object to that. 560

Justice Breslin: Sustained.

Mr. Stein: I don't know any other way to ask it, Judge.

Justice Breslin: Sustained.

Mr. Stein: Question withdrawn.

Q. Tell us the circumstances under which you came to move the book from Room 908 of 37 West 20th Street to some place else.

Mr. Kern: I object to that. It is irrelevant and immaterial, not binding on this defendant. Incompetent for any purpose.

Mr. Stein: It is certainly extremely 561 relevant. It has been established by one witness that books were found in another part of the building.

Justice Breslin: We will take it.

Mr. Kern: Exception.

Q. Tell us the circumstances, Mr. Levenberg—

Justice Breslin: Overruled.

Q. —under which you came to move books from Room 908 of 37 West 20th Street to some place else. A. Well, at one time Mr. Mishkin notified me that, "Stay away from the warehouse."

Q. By "warehouse" you mean Room 908? A. 908.

Q. Go ahead. A. "Because the place was under surveillance." And for a couple of weeks I just let it go at that, but the warehouse was in my name. I had my name on the lease.

Q. Go ahead. A. And I was pretty nervous about it. And the first chance I got I wanted to get those books out of there, which I did. I got them down to the basement of the same building.

563 Q. About when, sir? A. Pardon?

Q. About when?

Justice Galloway: When did you do that?

The Witness: It must have been sometime in November, I would say—the middle of November.

Justice Galloway: Of '59?

The Witness: Of '59.

Q. Now, is there anything else that you can tell this Court concerning the arrangements that you and Mr. Mishkin had entered into for the maintenance of the warehouse or the care of 564 books therein? A. Well, originally, Mr. Mishkin had another fellow taking care of the warehouse for him. In other words, I would just move the books from the binder into the warehouse, and my job was done. I would get paid, and that was it. And some other fellow would take care of the warehouse for him. But in—I am trying to think of dates now. At one time I told Mr. Mishkin, who had never been up into this warehouse, I wanted him to take a look at that warehouse; I just wanted him up there to take a look at it. Mr. Mishkin came up there; and upon looking at the warehouse, he fired the man

that was taking care of it for him and he asked me to take over that fellow's job until he could get somebody else to fill the orders for him.

Q. When you took over the fellow's job, what did that entail? A. It meant filling the orders.

Q. Filling the orders for what?

Justice Galloway: For the books, wasn't it?

The Witness: For the books, yeah. For the books.

Justice Galloway: Where would you get these requisitions from for the books? 566

The Witness: Mr. Mishkin would have me come down to the store, and he would give me a slip of paper with the books written down on it.

Q. What would be done? A. I would go up to the warehouse and fill out the order accordingly.

Q. What would you do with the books? A. I would bring them back to his store.

Q. Which store? A. The Publishers—nine out of ten times it was the Publishers Outlet.

Q. Any other— A. A couple of other times it was in stores around the same neighborhood, but most of the time it was the Publishers Out- 567 let.

Q. Now, you mentioned before something happened and Mr. Mishkin fired the man who was working for him, but you couldn't recall the date. Do you recall the date now? A. I think it was about March of '59.

Q. About March of '59. I want you to try to recall now whether you remember any other stores to which Mr. Mishkin asked you to come in order to make arrangements for either the production or the distribution of these books. A. Yes. At one time—at one time they opened

up—Mr. Mishkin opened up a store called the Main Stem Book Store.

Q. Where is that located? A. On Broadway, 49th Street.

Mr. Kern: May I ask for the date, if the Court please?

Justice Breslin: Yes.

Mr. Kern: I hear one time throughout. I don't know when.

Justice Breslin: Yes. Fix the time.

569 Justice Galloway: When was that?

Q. About when did he open up the Main Stem Book Store?

Justice Galloway: Let's start at the year. Do you know what year it was?

The Witness: I would say it would be about the—I would say it would be around the beginning of '59 they opened up the Main Stem Book Store. It is just a guess. I am trying to get as close as I can.

Justice Breslin: About two years ago?

The Witness: About two years ago—

570 Justice Breslin: All right.

The Witness: —correct.

Q. How do you know Mr. Mishkin opened up the store himself? A. Because he made that his headquarters. If I wanted to see him any time I would come down to see him at that store. For a few months I used to go down to the Main Stem Book Store.

Mr. Kern: Now, I move that the Court order stricken from the record the words, "Mr. Mishkin opened up the store."

Mr. Justice Breslin: Yes, strike it out.

Mr. Kern: The only way he says he knows that is he made it his headquarters.

Justice Breslin: Strike it out.

Mr. Kern: That doesn't mean it was his store—

Q. Mr. Levenberg—

Justice Breslin: Stricken.

Q. —when Mr. Mishkin asked you to come to the store, did he tell you anything at all relevant to his relationship with the store? 572

Mr. Kern: Now, I object to this. I think the district attorney is leading the witness here, especially at a crucial point or moment which we have reached now with regard to the ownership of that store.

Justice Breslin: Try not to lead, Mr. Stein. Don't lead.

Mr. Stein: All right.

Q. Mr. Levenberg, can you tell us anything about the Main Stem Store? A. Well, Mr. Mishkin referred to it as his store; and he was there in the beginning when they opened it up. 573 He was there. He was giving everybody directions how to knock up the shelves, where to put the shelves, where to put the books.

Q. Mr. Levenberg, do you have any recollection at the present time of any other arrangements that were made between you and Mr. Mishkin concerning the general procedure followed in printing up these books? A. I don't understand your question.

Justice Galloway: Well, did he tell you when you would get paid, or how you would get paid, or what? What was the deal?

The Witness: The deal was I would print up the books, put them in the warehouse; and after I put them in the warehouse, I would go down and get paid.

Justice Galloway: Who would pay you?

The Witness: Mr. Mishkin.

Justice Galloway: Where would he pay you?

The Witness: He would pay me either in the store or in the bar next to the store.

Justice Galloway: In what form?

The Witness: Almost always in cash.

575 Justice Galloway: How much would he pay you?

The Witness: Well, the average book was forty cents a book.

Q. Forty cents per copy, is that correct? A. Forty cents per copy.

Q. At this time, Mr. Levenberg, I would ask you if you would be good enough to turn these books which are in front of you over so that they are face up.

Justice Galloway: I would like to ask a ques-

576 tion, Mr. Witness—

Mr. Stein: Yes, Judge.

Justice Galloway: —Mr. D. A.

Whenever you made —or you made this arrangement with Mr. Mishkin, was there any minimum quantity of how many you would get printed, or a maximum, or was it a scale? Did you get five copies printed, or ten copies, or a thousand? What—

The Witness: No. The minimum order we always printed was a thousand. The minimum order was a thousand, and usually it was twenty-

five hundred. Either a thousand or twenty-five hundred. And sometimes, on a thin little book, it would run as much as five thousand.

Justice Galloway: In other words, it would be forty cents apiece?

The Witness: Forty cents apiece for one of these type of books here, a thick book like that.

Justice Galloway: How about for the thin ones?

The Witness: No. The thin one was a special price. I would have to figure it out. It would come out to maybe fifteen or twenty cents. 578

Justice Galloway: Well, in other words, at times you would be getting a thousand dollars in cash from Mr. Mishkin, is that right?

The Witness: That's correct.

Justice Galloway: All right.

Q. Mr. Levenberg, I ask you to look at People's Exhibit 1 for identification which is now in front of you, a book entitled "Chances Go Around." Would you tell us when you printed this for the defendant and approximately how many copies you printed for him? A. I printed a thousand of these in—about April of '59. 579

Mr. Stein: I offer this in evidence as People's Exhibit 1.

Justice Breslin: What is that exhibit?

Mr. Stein: "Chances Go Around."

Justice Breslin: No, no. It is marked for—

Mr. Stein: For identification.

Justice Gassman: Do you object? He is offering it.

Justice Breslin: —identification, one. Show it to Counsel.

Mr. Kern: Is that in April, 19—

Mr. Stein: April, 1958.

Mr. Kern: —1958. Well, I object to this, if the Court please, on this ground among others: This is without the scope of this information, and the statute of limitations bars this. There's a two-year statute of limitations, and this information was presented to the Court of Special Sessions in May of 1960.

Mr. Stein: '60?

Mr. Kern: And what year was that?

Justice Galloway: April of '59.

Mr. Kern: Oh, '59. Oh, I'm sorry.

Justice Galloway: I think that is what he testified to.

Is that correct?

The Witness: That's correct.

Justice Galloway: All right.

Mr. Stein: It is received?

Justice Breslin: Yes, received.

Mr. Kern: Well, may I just ask the Court to give me a blanket objection and exception to the receipt into evidence of all of these books and any document which might be offered, and I make this request in connection with the motions which I made at the outset of this trial and upon the grounds which I specified in those motions.

Justice Breslin: All right. The objection is overruled. That is received as People's Exhibit 1.

(People's Exhibit 1 for identification received in evidence and marked People's Exhibit 1 in evidence.)

Mr. Stein: What I should like to do at this time, I have two metal containers here in which I hope to put the complete sets of each of the books we allege are pornographic, so they can be accessible to the judges.

Mr. Kern and I have so agreed. Is that correct?

Mr. Kern: Yes.

Mr. Stein: Would you be good enough to bring those two containers here? 584

Justice Gassman: What have you got, two drawers, or three?

Mr. Stein: Two drawers, Your Honor; and I anticipate using this box for the marked copies.

Justice Gassman: Yes. Now, have you got copies for the Court for each member of the bench?

Mr. Stein: Yes. I have one copy for each member of the bench and one copy for Mr. Kern.

Justice Gassman: Well, so we don't have to lug them in our arms, I think 585 you ought to have a third drawer down there when all of these books are admitted in evidence; send it down to the chambers of each judge.

Mr. Stein: That's precisely what I would like to do, and I intend using this carton as the third box.

Is that all right, Mr. Kern?

Mr. Kern: Oh, yes. Sure.

Mr. Stein: (addressing Court Officer) Would you be good enough to open these drawers and place in them one copy of each book as it is received in evidence.

586 *People's Witness, Norman Levenberg, Direct*

Q. I show you People's Exhibit 2 for identification, Mr. Levenberg; and I ask you whether you can tell us when you printed this for the defendant and how many copies you made? A. I made twenty-five hundred of these in August of '58.

Mr. Stein: I offer this in evidence as People's Exhibit 2.

Justice Breslin: Same objection. Same ruling. Received in evidence as People's
587 2. (So marked.)

Q. I show you—

Justice Breslin: The title of that is "Impact".

Mr. Stein: "Impact", that's correct.

Justice Breslin: Yes.

Q. I show you People's Exhibit 3 for identification, a book entitled "The Female Sultan", and I ask you whether you can tell us approximately when you printed that for the defendant and how many copies you printed? A. I printed a thousand in July of '59.
588

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Same ruling. Defendant has an objection, with an exception.

(People's Exhibit 3 for identification marked People's Exhibit 3 in evidence.)

Q. I show you People's Exhibit 4 for identification, a book entitled "Satin Satellite"; and I ask you when you printed this for the defendant and approximately how many copies of each you made? A. This goes back a while. Can I refer to notes I have on that as to the date?

Q. You have no present recollection, is that it? A. Well, I remember doing it, but I am not quite certain as to the date.

Q. You may refer to your notes. A. I printed twenty-five hundred in March of '58.

Q. Do you recall approximately when in March, sir? A. I don't know exactly when.

Q. Beginning, middle, or the end? Can you tell at all? A. I couldn't tell you that.

Mr. Stein: I offer this in evidence.

Mr. Kern: Some of these, if the Court 590
please, are outside of the period which is countenanced by the statute of limitations; that is, two years before the presentation of the information.

Mr. Stein: Your Honor, I will show by additional witnesses that this book, although printed, perhaps, sometime in March, with the date not specified, actually had its printing completed after the period of the statute of limitations has begun to run.

Mr. Kern: This witness, if the Court 591
please,—and this is in answer to the district attorney's direct question, "When were these printed?" He said, "April of 1958." Either they were printed then or they were not printed then.

Justice Galloway: He said March.

Mr. Kern: March.

The Witness: March, '58.

Justice Galloway: You are cheating yourself.

Mr. Kern: Yes, that's right.

Mr. Stein: The information in this case, Your Honor, was filed, I believe, on March the 3rd, which is the time the statute would start to run. I ask that the Court receive this subject to further connection, so that—

Justice Breslin: Well, are these all books which were recovered from the warehouse?

Mr. Stein: Yes, Your Honor.

593 Justice Breslin: Your objection is overruled. We will take them subject to connection.

(People's Exhibit 4 for identification received and marked People's Exhibit 4 in evidence.)

Justice Breslin: Might I suggest that you indicate, too, on these different exhibits whether there was a publisher's name indicated on them.

Mr. Stein: Oh, yes. May the record reflect that the book entitled, "Satin Satellite" has on the back cover the words

594 "Conway Press, New York, New York".

Justice Gassman: Conway?

Mr. Stein: "Conway Press, New York, New York", with no specific address.

May the record also reflect that this is a book of approximately eighty pages with the price five dollars imprinted on the cover thereof.

Justice Gassman: Five. Now, what about the other three exhibits which you offered?

Justice Galloway: How about 1, 2, and 3?

Mr. Stein: People's Exhibit 1 has "J. K. Publishing Co.,—"

Justice Gassman: G. J.?

Mr. Stein: "J. K. Publishing Co., New York City, New York" on it. It is a book of exactly fifty pages with a price "ten dollars" stamped on the first—on the cover.

Justice Gassman: Are all these soft-covered books?

Mr. Stein: These are all soft-covered books, Your Honor. 596

Justice Gassman: Yes.

Mr. Stein: People's Exhibit 2, "Impact" has no publisher's name any place thereon. It is a book of approximately—of one hundred forty pages with a price "five dollars" printed on the cover thereof.

Exhibit Number 3, "Female Sultan", has "The BNB Publishing—"

Justice Gassman: G and M?

Mr. Stein: "BNB Publishing Company, New York, New York" printed thereon. It is a book of one hundred and fifty-three 597 pages with the price "ten dollars" stamped on the cover.

Justice Breslin: When those books were printed, were you operating, sir, the business under any of those names given, the J. K. Publishing Company,—

The Witness: No.

Justice Breslin: —the BNB Publishing Company,—

The Witness: No.

Justice Breslin: —or the Conway Press?

The Witness: No.

598 *People's Witness, Norman Levenberg, Direct*

Justice Breslin: How did you happen to print those names on these exhibits—1, 3, and 4—as the names of the publishers?

The Witness: Well, Mr. Mishkin asked me to make up any name. A couple of times he did have publishers' names on the back of the manuscript. He had it in the manuscript, so I would just follow the manuscript; and when it wasn't in the manuscript I would make up a name. I don't remember if I made up these names or not. They may have been in the manuscript.

599 Q. Sir, in one of the books the name J. K. Publishing Company appears. Does that mean anything to you? A. It doesn't mean anything to me.

Q. J. K.? A. J. K.?

Justice Breslin: No?

The Witness: No.

Justice Breslin: By the way, what happened to these original manuscripts after you printed these books?

The Witness: I threw them out.

600 Justice Breslin: You destroyed them? All right.

Q. I show you People's Exhibit 5 for identification, a book entitled "Her Highness"; and I ask you approximately when you printed this and how many copies of it you printed? A. Twenty-five hundred in September—twenty-five hundred in September of '58.

Mr. Stein: I offer this in evidence as People's Exhibit 5.

Justice Breslin: All right. Received. People's 5.

(People's Exhibit 5 for identification marked People's Exhibit 5 in evidence.)

Justice Galloway: Do you want to give us the name of the publisher?

Mr. Stein: Yes. As soon as it is marked.

Justice Galloway: As soon as it is marked.

Mr. Stein: There is no publisher's name or address on "Her Highness", People's Exhibit 5. "Her Highness" contains 128 pages with the price "ten dollars" stamped on the cover. 602

Q. I show you People's Exhibit 6 for identification, and I ask approximately when you printed this and how many copies of it you printed? A. July of '58, one thousand.

Mr. Stein: I offer this in evidence.

(People's Exhibit 6 for identification marked People's Exhibit 6 in evidence.)

Mr. Stein: The only word dealing with printers here is a statement on the cover stating "Issued privately for subscribers only", and on the first inside page "Issued for subscribers only. New York, New York". 603

Justice Gassman: How many pages?

Mr. Stein: "Mistress of Leather" has —well, the pages are not numbered, Your Honor, but it is a book which is slightly thicker than all of the books previously introduced. And the price on the cover— There is no price given, Your Honor.

And may I also indicate that "Her Highness", which I stated before has no publisher's name on it, states "Privately printed"—

604 *People's Witness, Norman Levenberg, Direct*

Justice Breslin: We did admit that.

Mr. Stein: —on the back cover.

Justice Breslin: All right.

Q. Mr. Levenberg, I show you People's Exhibit 7 for identification; and I ask you approximately when you printed this and how many copies thereof you printed? A. September, '58, I printed a thousand.

Mr. Stein: I offer this in evidence.

605 Justice Gassman: How many?

The Witness: A thousand.

Justice Breslin: Received. People's Exhibit 7.

(People's Exhibit 7 for identification marked People's Exhibit 7 in evidence.)

You have an objection to all of these, Mr. Kern?

Mr. Kern: Yes. Thank you.

Justice Breslin: Objection overruled, with an exception to the defendant.

Mr. Stein: People's Exhibit 7 does not
606 have the name or address of a publisher, but contains—it contains 48 pages. The price on it is "five dollars".

Mr. Kern: May it be noted that the witness has before him a number of sheets of paper, and I assume he is refreshing his recollection from those sheets.

The Witness: Correct.

Q. Is that correct, Mr. Levenberg? A. That's correct.

Justice Breslin: All right.

Q. Mr. Levenberg, I show you People's Exhibit 8 for identification, and ask you how many copies of this you printed and approximately when you did so? A. September—September of '58, one thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 8 in evidence. (So marked.)

Mr. Stein: "Strange Passions", People's Exhibit 8—

Justice Gassman: What was the name? 608

Mr. Stein: "Strange Passions", states "The Lashe Press. Printed in the United States of America". It's a book—and on the back cover it states "Privately printed". It is a book containing—the pages are not numbered, Your Honor, but it is a book which is slightly thinner than those previously introduced in evidence; and no price appears on the cover of this book.

Q. I show you People's Exhibit 9 for identification, a book entitled "The Whipping Chorus Girls", Mr. Levenberg; and I ask you approximately how many copies you printed and approximately when you did so? A. September of '58, one thousand. 609

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 9. (So marked.)

Mr. Stein: People's Exhibit 9, rather, does not have the name or address of the publisher on it. There is a statement on it on the second page which says "Note:

This work has been published in a limited edition of one thousand copies and is for sale to serious adult students of psychology, medicine, and sociology." There is no price printed on the cover of this exhibit, however.

Justice Breslin: Are you the author of that foreword in this book?

The Witness: No. That book was not a manuscript. That book was a previously-printed
611 book which I printed up,—

Justice Breslin: I see.

The Witness: —so that was already in the previous book.

Justice Gassman: How many pages?

Mr. Stein: This book, Your Honor, has —the pages are not numbered in this book, your Honor. It is a book that is approximately the same thickness as People's Exhibit 8.

One of the four copies has a cellophane wrapper still around it, and in crayon is
612 written "five dollars".

Q. I show you People's Exhibit 10, Mr. Levenberg, a book which bears two titles, "Order of the Day" and "Bound Martially"; and I ask you approximately when you printed this and how many copies of it you printed? A. May of '58, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 10. (So marked.)

Mr. Stein: People's Exhibit 10 contains —the pages are not numbered. It is the same thickness as the previous book.

There is no price on the cover. There is a statement on the cover that says "Published by CIA Publications, Parisian Edition". On the inside first page there is a statement "privately printed edition limited to one thousand copies for distribution only to adults, collectors, and students of psychology, sociology, and members of the learned professions. Notice: Reproduction of text or illustrations in part or whole is absolutely forbidden without the written consent of all 614
the publishers. Printed in the United States of America." This, then, is the Parisian edition of the book printed in the United States.

Q. I show you—

Justice Breslin: A book of that type, People's Exhibit 10, how much were you paid for printing a thousand copies of that?

The Witness: This would be thirty or forty cents.

Justice Breslin: Thirty or forty cents. 615

The Witness: Thirty or forty cents.

Justice Breslin: Thirty or forty cents.

The Witness: Yes.

Q. Mr. Levenberg, I show you People's Exhibit 11, a book entitled—for identification—"Dance With a Dominant Whip". Will you please tell us when you printed this and how many copies you printed? A. July, '58, a thousand.

Mr. Stein: I offer this in evidence.

Justice Gassman: How many?

Mr. Stein: One thousand. One thousand.

Justice Breslin: All right. Received, People's Exhibit 11. (So marked.)

Mr. Stein: People's Exhibit 11 has written on the cover of it "Panurge Limited, London, England". No address of a publisher is on this exhibit. It has 95 pages, and is about the same size as the previous exhibit. There is no price on it.

Q. I show you People's Exhibit 12, a book
617 entitled "Cult of the Spankers", Mr. Levenberg. I ask you approximately when you printed that and how many copies you printed? A. July of '58, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 12. (So marked.)

Mr. Stein: People's Exhibit 12 also has the notation on the cover "Panurge Limited, London, England". There is no price. It has 32 pages.

Justice Gassman: What is that name, please?

618

Mr. Stein: Panurge. P-a-n-u-r-g-e. It is one word, Your Honor.

Justice Gassman: Panurge.

Q. I show you People's Exhibit 13 for identification, a book entitled "Confessions", Mr. Levenberg. Would you be good enough to tell us approximately when you printed this and how many copies you did print? A. August, '58, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 13. (So marked.)

Mr. Stein: People's Exhibit 13 has a statement on the back cover "A new attractive illustrated edition. Privately printed", with the same statement on the first page thereof. On the second page there is a statement, "Printed in the United States of America, Limited edition. Of this edition fifteen hundred copies have been printed for adult collectors of curiosa." This book as 128 pages with a price "fifteen dollars" on it. There is a 620
statement on the last page which reads, "Note: This publication recording true phychological phases of sadism and masochism is intended only for serious adult students, physicians, and members of the learned professions. It is not intended nor will it be sold to minors; and is not published for the amusement of the prurient."

Q. I show you People's Exhibit 14, a book entitled "The House of Torture". Approximately when did you print this for the defendant and how many copies did you print? A. August, '59, 621
a thousand.

Justice Breslin: '59, is that?
The Witness: That's right.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 14.

Mr. Stein: "The House of Torture", Your Honor, is not listed as one of those for failure to state the name and address of the publisher, nor are the following few exhibits extending down through 20 for identification.

Justice Breslin: Just repeat that. You say it is not listed—

Mr. Stein: We do not charge a violation of the General Business Law for—

Justice Breslin: How about 173?

Mr. Stein: For "The House of Torture"?

Justice Breslin: Yes. You have it listed here on the memo.

Mr. Stein: Oh, I am sorry, Your Honor.
623 You are correct. This is the only one of those black and white books for which there is no name and address of a publisher. I am sorry.

Q. Did you tell us when you printed this and the number of copies? A. August, '59. Actually, on all of these black books here—

Justice Breslin: Received.

Q. Go ahead, Mr. Levenberg. A. On all these books—these black books, we call these "Black books" because it is a one-colored job.

624 Q. Those are Exhibits 14 through 20, is that correct? A. Yes. This one here, too.

Q. 14 through 20, and 52 through 56. A. I started work—I started work on this order—I got all these books together. I started working in June. I didn't finish the order until August, so I have August down here, but actually some of them may have been delivered in July of '59, too.

Q. So that the period involved would be July and August of 1959? A. Yes. I might have—I have August down here.

Mr. Stein: May the record reflect that the "black books," as the witness referred to them, are small black and white illustrated books.

(People's Exhibit 14 for identification marked People's Exhibit 14 in evidence.)

Mr. Stein: People's Exhibit 14 does not contain the name and address of any publisher. It has 62 pages.

Justice Gassman: 52?

Mr. Stein: 62. 626

Justice Gassman: Os, 62.

Mr. Stein: There is no price listed.

Q. I show you People's Exhibit 15 for identification, sir; and I ask you whether you can identify this—or when you printed this approximately and how many copies you printed? A. August, '59, a thousand.

Mr. Stein: Now, this book, "Bound in Rubber," I now offer in evidence as People's Exhibit 15.

Justice Breslin: That is received. People's Exhibit 15. (So marked.) 627

Justice Gassman: Will you give me the pages in number—

Mr. Stein: Yes.

Justice Gassman: —15 and the price?

Mr. Stein: There are 94 pages, and I'm certain that in this instance we do not charge a violation of the General Business Law.

Justice Gassman: I understand that, but I want to get the information as to the number of pages and price.

Mr. Stein: There are 94 pages.

Justice Gassman: How much?

Mr. Stein: No price appears on the cover of this book.

Justice Breslin: Who is listed as the publisher?

Mr. Stein: The Nutrix Publishing Company, at 35 Montgomery Street, Jersey City 2, New Jersey.

Justice Breslin: Is there such a concern, do you know, Mr. Witness?

629 The Witness: There was such a concern.

Justice Breslin: By the way, do I understand that all of these exhibits, 1 to 14 inclusive, after you printed them, you delivered fifty copies to each of the two stores down on 42nd Street.

The Witness: That's right. Publishers and Midget Book Store.

Justice Breslin: Publishers—

The Witness: Publishers Outlet.

Justice Breslin: What is the full name of the stores?

The Witness: Publishers Outlet—

Justice Breslin: Yes?

630 The Witness: —and the Midget Book Store.

Justice Breslin: Are both of them on West 42nd?

The Witness: West 42nd.

Justice Breslin: Fifty to each store?

The Witness: As soon as I completed the order, that's what I would do.

Justice Breslin: You would deliver them, yourself?

The Witness: Usually, yes.

Q. I show you People's Exhibit 16 for identification, a book entitled "Arduous Figure Train-

ing at Bondhaven"; and I ask you approximately when you printed this book and how many copies did you print? A. August, '59, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 16. (So marked.)

Mr. Stein: People's Exhibit 16 does not have the name and address of a publisher found any place thereon. It has 62 pages, with no price.

632

Q. I show you People's Exhibit 17, a book entitled "Return Visit to Fetterland"; and I ask you approximately when you printed this book and how many copies of it you printed? A. August, '59, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 17. (So marked.)

Mr. Stein: People's Exhibit 17 has the name "Nutrix Company" on it, "35 Montgomery Street, Jersey City 2, New Jersey." We do not allege a violation of the General Business Law. There are 94 633 pages. There is no price printed on the cover of the book. However, in the front part of the rear cover is a list of prices which include some of the prior black and white exhibits and some of those subsequently to be offered in evidence. May I state generally that the price varies from three dollars and fifty cents to six dollars for these black and white books.

Justice Gassman: Is the price of this book listed there?

Mr. Stein: The price of this book is not listed inside this particular publication, Your Honor.

Justice Gassman: All right.

Justice Breslin: Did I understand you, sir, to say in answer to Judge Galloway's question that you were paid when you made these deliveries of fifty books to these stores, either of them, on 42nd Street?

The Witness: Soon after that, Your Honor.

Justice Breslin: I see. Was this defendant ever present in those stores or either of them when you made these deliveries of the completed book?

The Witness: Yes, Your Honor.

Q. I show you People's Exhibit 18 for identification, a book entitled "Fearful Ordeal in Restraintland"; and I ask you when you printed this book and how many you printed? A. August '59, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 18. (So marked.)

Mr. Stein: The name "Nutrix Company 35 Montgomery Street Jersey City, New Jersey" appears on this exhibit. We do not charge a violation of the General Business Law. There are 62 pages. No price is listed in the book.

The price of the book next to be introduced into evidence, "Women in Distress," is listed as six dollars. "Pleasure Parade," as six dollars, "Bound in Rubber," as six dollars. And "Vacation in Fet-

terland," as six dollars. These are on the inside portions of the cover.

Q. I show you People's Exhibit 19 for identification; and I ask you approximately when you printed this and how many copies of each you printed? A. August, '59, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 19. (So marked.)

Mr. Stein: People's Exhibit 19 for identification contains the name "Nutrix Publishing Company" in Montgomery Street, Jersey City, New Jersey. We do not charge a violation of the General Business Law. 638

Justice Galloway: 19 in evidence.

Mr. Stein: That's right. That was in evidence, "Women in Distress." Yes, I am just reading the pertinent portions, Your Honor.

Justice Galloway: You just said "identification."

Mr. Stein: I am sorry. 639

Justice Galloway: It was already admitted in evidence.

Mr. Stein: I am sorry. Yes. I am sorry, Your Honor.

There are 94 pages here, and there is no price listed.

Oh, Exhibit 19 also lists the prices of some of the books. On the inside cover there is a statement that "The first three issues of 'Pleasure Parade' books Number 1, 2, and 3, plus the bondage story book

'Vacation in Fetterland,' for only $21.00; regular price is $6.00 per book, so you can save $3.00 on the special offer."

Q. I show you People's Exhibit 20 for identification, Mr. Levenberg; and I ask you approximately when you printed this and how many copies of it you printed? A. August, '59, a thousand.

Mr. Stein: I offer this book in evidence.

641 Justice Breslin: Received. People's Exhibit 20. (So marked.)

Mr. Stein: People's Exhibit 20 has a statement that it is printed by Nutrix Publishing Company of 35 Montgomery Street. We do not charge a violation of the General Business Law. There are 94 pages to this book. There is no price on the cover.

Justice Breslin: That is a reprint, is it, sir?
The Witness: That's a reprint, correct.

Justice Breslin: Yes.

642 Q. Mr. Levenberg, as to the black and white books, Exhibits number 14 through 20, were these books given to you in manuscript form or in the form of a finished book? A. Finished book.

Q. And would the same be true, sir, for the black and white books which are numbered 52 through 56 for identification? A. That's right. Yes. That's correct.

Q. And similarly, for the black books numbered 46 through 51 for identification, sir? A. That's correct.

Q. I show you People's Exhibit 21 for identification, a book entitled "Screaming Flesh"; and

I ask you approximately when you printed this book and how many copies of it you printed? A. May of '59, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 21. (So marked.)

Mr. Stein: People's Exhibit 21 has no name and address of the publisher on it. There is a statement on the back cover merely which says, "For sophisticated collectors of the unusual, for lovers of the unusual." It contains 176 pages, with the price of "five dollars" printed on the cover.

644

Q. I show you People's Exhibit number 22 for identification, a book entitled "Fury." I ask you approximately when you printed this and how many copies of it you printed? A. January, '58. We printed twenty-five hundred.

Mr. Stein: I offer this in evidence.

Justice Breslin: What year?

The Witness: '58.

645

Justice Gassman: January, '58.

Mr. Kern: This was in January, '58? I make the same objection to this.

Justice Breslin: All right. Same ruling.

Mr. Kern: Exception.

Justice Gassman: Twenty-five or twenty-five hundred?

Justice Galloway: Twenty-five hundred.

The Witness: Twenty-five hundred.

Justice Galloway: That's what I thought.

(People's Exhibit 22 for identification marked People's Exhibit 22 in evidence.)

Mr. Stein: People's Exhibit 22 does not have the name or address of the publisher on it. It is a book of 103 pages, with the price "four dollars" printed on the cover.

Q. I show you People's Exhibit number 23
647 for identification, Mr. Levenberg; and I ask you when you printed this and approximately how many copies of it you printed? A. April of '58, five thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 23. (So marked.)

Mr. Kern: May I make the same objection as to this?

Justice Breslin: Yes.

Mr. Kern: May I point out to the Court that my objection is not directed with
643 regard to these books to the counts charging possession, but to the counts charging publishing and failing to print publishers' names and addresses. I just wanted to make my position clear. I didn't want the Court to think that I am objecting—

Justice Gassman: I think we got your point.

Mr. Kern: Yes, I think so.

Mr. Stein: People's Exhibit 23 does not contain the name or address of any publisher.

Justice Gassman: It isn't charged as a publishing count.

Mr. Stein: It is charged merely as—

Justice Gassman: Exhibit 23 is just charging possession.

Justice Breslin: All right. What is offered now?

Mr. Stein: 23, Your Honor. I wanted to read into evidence the fact that this book contains 42 pages, with the price of "one dollar and fifty cents" on the cover. On the back cover are the words, "A torrid tale of a plump lady who is laced tightly." 650

Q. I show you People's Exhibit 24 for identification, Mr. Levenberg; and I ask you approximately when you printed this book and how many copies of it you printed? A. February of '58, thirty-five hundred.

Mr. Stein: I offer this book in evidence.

Justice Breslin: Same objection is there, Mr. Kern?

Mr. Kern: Yes. Thank you. 651

Justice Breslin: Same ruling.

(People's Exhibit 24 for identification marked People's Exhibit 24 in evidence.)

Mr. Stein: People's Exhibit 24 does not contain the name or address of a publisher. It consists of 147 pages. There is no price which appears on it.

Q. I show you People's Exhibit number 25 for identification, Mr. Levenberg; and I ask you approximately when you printed this and how many copies of it you printed? A. March of '58, twenty-five hundred.

652 *People's Witness, Norman Levenberg, Direct*

Mr. Stein: I offer this book in evidence.

Justice Breslin: All right. Received. People's Exhibit 25. (So marked.)

Mr. Stein: People's Exhibit 25 has a statement on the rear cover which reads, "Rainbow Publishing Company, Brooklyn, New York."

Q. Mr. Levenberg, does that name mean anything to you? A. No.

Q. Is this a book for which you were given a
653 manuscript, or is this a book which— A. I was given a manuscript for this book.

Q. Do you have any recollection how the name "Rainbow Publishing Company, Brooklyn, New York" came about? A. Either Mr. Mishkin told me to put that name or maybe I made it up. I don't remember.

Mr. Stein: This book contains approximately—or contains exactly 122 pages. The price "five dollars" is printed on the cover of it. On the rear cover are the words, "A gripping novel. Laurie, torn
654 between a flaming carnal love for Steve and a dark implaccable desire leading to self-destruction."

Q. I show you People's Exhibit 26 for identification, Mr. Levenberg. I ask you approximately when you printed this and how many copies of it you printed? A. January, '58, twenty-five hundred.

Mr. Stein: I offer this in evidence.

Mr. Kern: Same objection.

Justice Breslin: Same ruling. People's Exhibit 26. (So marked.)

Mr. Stein: People's Exhibit 26 does not contain the name or address of any publisher. It consists of 135 pages, with the price "four dollars" on the cover.

Justice Gassman: Four what?

Mr. Stein: Four dollars, Your Honor.

Q. I show you People's Exhibit 27 for identification, Mr. Levenberg. I ask you approximately how many copies of this you printed and the approximate date you printed it? A. October, '58, a thousand. 656

Mr. Stein: I offer this in evidence.

Justice Breslin: Received, People's Exhibit 27. (So marked.)

Mr. Stein: People's Exhibit 27 does not contain the name and address of any publisher. It has 144 pages, and the price "five dollars" is written on the cover thereof.

There is a statement which appears on the front page, to wit: "The sensational story of a beautiful girl wrestler and a psychopathic rapist." 657

Q. Mr. Levenberg I show you People's Exhibit 28 for identification; and I ask you approximately when you printed this and how many copies of it you printed. A. January, '58, twenty-five hundred.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 28.

Mr. Kern: Same objection.

Justice Breslin: Same ruling.

(People's Exhibit 28 for identification marked People's Exhibit 28 in evidence.)

658 *People's Witness, Norman Levenberg, Direct*

Mr. Stein: People's Exhibit 28 does not contain the name or address of a publisher. It has 127 pages. "Four dollars" is printed on the cover.

Q. I show you People's Exhibit 29 for identification, Mr. Levenberg. I ask you approximately when you printed this and how many copies of it you printed? A. May, '59, one thousand.

659 Mr. Stein: I offer this in evidence.

Justice Breslin: Is that May, '59?
The Witness: May, '59.
Justice Breslin: How many?
The Witness: One thousand.

Justice Breslin: Received. People's Exhibit 29. (So marked.)

Mr. Stein: People's Exhibit 29 bears the statement "Copyright by Holiday Press" on the first page thereof. It consists of 176 pages with the price "five dollars" on the front cover. On the rear cover appear the
660 words, "For sophisticated collectors of the unusual for lovers of the unusual."

Q. Mr. Levenberg, I show you People's—

Justice Gassman: Before you go into that—

—Is the name "Holiday Press" the name of any firm you know of?

The Witness: No, it is not.
Justice Gassman: How did you come to put that name on there?
The Witness: I think that particular name Mr. Mishkin suggested to me.

Q. Mr. Levenberg, I show you People's Exhibit 30 for identification; and I ask you approximately when you printed this book and how many copies of it you printed? A. February, '59, one thousand.

Mr. Stein: I offer in evidence a book entitled "Raw Dames."

Justice Breslin: Received. People's Exhibit 30. (So marked.)

Mr. Stein: People's Exhibit 30 does not contain the name and address of any 662
publisher. It consists of 144 pages, with the price "five dollars" appearing on the cover.

Mr. Kern: What was that, please?

Q. What was the date of the printing of that?

Justice Breslin: February, '59.

A. February, '59, one thousand.

Q. I show you People's Exhibit 34—Excuse me.

Justice Gassman: What happened to 31?

663

Q. 31, 32, and 33, Mr. Levenberg,—

Justice Gassman: Oh, yes, 31.

A. I did not print those.

Q. —you stated you did not print these, is that correct? A. No, I didn't print those.

Justice Breslin: We will take a five-minute recess and give the stenographer a rest.

664 *People's Witness, Norman Levenberg, Direct*

(Five-minute recess.)

Mr. Stein: Would you call Mr. Levenberg, please.

NORMAN LEVENBERG retakes the stand:

Court Officer: Just have a seat. You are still under oath.

Mr. Stein: If Your Honor please, the
665 next books I am going to introduce in evidence do not involve violations of the General Business Law. Those are—involve, rather, only violations of the General Business Law. Those are Exhibits 34 to 42 for identification.

Justice Gassman: 34 to 42.

Q. Mr. Levenberg, I show you People's Exhibit 34 for identification. I ask you approximately how many of this book you printed and approximately when you did so? A. "This Way Down"?

666 Q. Yes. A. May of '59, a thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 34. (So marked.)

Mr. Stein: I don't think I need put additional copies of these with those for the Court since we do not allege these are pornographic.

"This Way Down" does not contain the name and address of any publisher.

Justice Gassman: How many pages?

Mr. Stein: Well,—

Justice Gassman: Oh, I see. You are not concerned with it. All right.

Q. I show you People's Exhibit 35 for identification, "The French Girl on the Stairs, Part One." I ask you how many copies of this you printed and approximately when you did so? A. March, '58, twenty-five hundred.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received. I don't know whether I indicated it, but that last one is received, too, 34.

This is 35 in evidence.

Mr. Kern: The same objection. Oh, 668
this is not for—Oh, yes.

Justice Galloway: This is only violation of the General Business Law.

Mr. Kern: Yes. That is exactly why I make my objection in this case. These publications—these printings and publications having taken place, as to "This Way Down," in May, 1959, and this book, "French Girl on the Stairs," I think is March, 1958,—

Justice Breslin: '58.

Mr. Kern: —prior to the two-year pe- 669
riod before the presentation of the information.

Mr. Stein: Again, Your Honors, "The French Girl on the Stairs", which is March, 1958, we shall establish through other witnesses that the period involved here was subsequent to the statute of limitations, which is March 3rd, the date of filing of the information.

Justice Breslin: We will take it subject to connection.

(People's Exhibit 35 for identification marked People's Exhibit 35 in evidence.)

Q. Would you recall, Mr. Levenberg, approximately when in March you printed "The French Girl on the Stairs"? A. No, I wouldn't want to do that.

Mr. Stein: "The French Girl on the Stairs" has a statement on the lower right-hand corner of the cover, which states, "A Kinney Publication." There is no address of any publisher or any other indication of who the publisher is.

671 Q. Do you have any knowledge, Mr. Levenberg, of what a Kinney Publication is? A. No.

Q. Do you recall how it is that you came to put this on the book? A. No, I don't remember how I came to put it down.

Justice Breslin: Was that from an original manuscript?

The Witness: This was from an original manuscript.

Q. I show you People's Exhibit 36 for identification, Mr. Levenberg. I ask you approxi-
672 mately when you printed this and how many copies of it you printed? A. March of '58, twenty-five hundred.

Mr. Stein: I offer this in evidence,—

Justice Breslin: Same objection.

Mr. Stein: —36 for identification.

Justice Galloway: Wasn't 36 "The French Girl on the Stairs"?

Mr. Stein: "Part Two," yes.

Justice Galloway: All right.

Mr. Stein: "Part Two, The French Girl on the Stairs."

673

Justice Breslin: Received. This is People's Exhibit 36. (So marked.)

Mr. Stein: That's correct Your Honor.

People's Exhibit 36 contains the name "A Kinney Publication" on the lower right-hand corner of the page. There is no other designation of publisher. There is no address of the publisher.

Justice Gassman: King?

Mr. Stein: Kinney Publication.

Justice Breslin: Kinney. Is that from an original manuscript?

674

The Witness: That's right.

Justice Breslin: Were you doing business under that name at the time you published the name "Kinney Publications"?

The Witness: No, Your Honor.

Q. I show you People's Exhibit number 37 for identification, Mr. Levenberg. I ask you approximately when you printed this and how many copies of it you printed? A. September, '58, five thousand.

675

Mr. Kern: What date?

Mr. Stein: September of '58.

The Witness: '58, right.

Q. Five thousand? A. Correct.

Mr. Stein: That's People's Exhibit 37 for identification, a book entitled "Smooth and Sassy," which I now offer in evidence.

Justice Breslin: All right. Same ruling. Received.

(People's Exhibit 37 for identification marked People's Exhibit 37 in evidence.)

676 *People's Witness, Norman Levenberg, Direct*

Mr. Stein: People's Exhibit 36—37, rather, does not contain the name or address of any publisher.

Q. I show you People's Exhibit number 38 for identification, Mr. Levenberg, a book entitled "Tattle Tales"; and I ask you approximately when you printed this and how many copies you printed? A. September of '58, fifteen hundred.

Mr. Stein: I offer this in evidence.

677 Justice Breslin: Received. People's Exhibit 38. (So marked.)

Mr. Stein: No name or address of the publisher appears on this exhibit.

Q. I show you People's Exhibit number 39 for identification, Mr. Levenberg; and I ask you approximately when you printed this book, "Look At Her Motor Turn Over," and approximately how many copies of it you printed? A. April of '59, one thousand.

Mr. Stein: I offer this in evidence.

678 Justice Breslin: Received. People's Exhibit 39. (So marked.)

Mr. Stein: People's Exhibit 39 does not contain the name and address of the publisher. On the cover of the book is a statement, "Limited edition. Fully illustrated."

Q. I show you Pople's Exhibit 40 for identification, Mr. Levenberg. I ask you approximately when you printed this and how many copies of it you printed? A. June of '58, five thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received. People's Exhibit 40. (So marked.)

Justice Gassman: Is there any name on there?

Mr. Stein: Yes, the name "Dunn Publishing Company."

Justice Gassman: Dunn, D-u-n-n?

Mr. Stein: D-u-n-n Publishing Company appears on the back cover of the book.

Q. Mr. Levenberg, do you recall whether this 680
was printed from an original manuscript? A. Yes, it was.

Q. And does the name "Dunn Publishing Company" mean anything to you? A. It may have been on the manuscript, or maybe I made it up, or maybe Mr. Mishkin told me to put it on.

Justice Galloway: You never used this name, did you?

The Witness: No, I never used that name.

Q. Do you know of any Dunn Publishing Company as related to the defendant or anyone else? 681
A. No.

Q. I show you People's Exhibit 41 for identification, a book entitled "The Hollywood Spankers"; and I ask you approximately when you printed this and how many copies of it you printed? A. July of '58. There was either five hundred—there was either five hundred or a thousand. I am not positive.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received. People's Exhibit 41. (So marked.)

682 *People's Witness, Norman Levenberg, Direct*

Mr. Stein: People's Exhibit 41 has printed on the cover thereof the words "Panurge Limited, London, England."

Q. Do you recall, Mr. Levenberg, whether you printed this from an original manuscript or from a book already printed? A. That was from a book already printed.

Q. And do you know how the name "Panurge Limited, London, England" came to be put on this cover? A. It was already on the book that
683 I printed.

Q. I now show you People's Exhibit 42 for identification, Mr. Levenberg, a book entitled "Anecdotia Spankiana," and I ask you approximately when you printed this and how many copies of it you printed? A. April, '59, one thousand.

Mr. Stein: I offer this book in evidence.

Justice Breslin: That will be received as People's Exhibit 42. (So marked.)

Mr. Stein: People's Exhibit 42 does not contain the name or address of a pub-
684 lisher. It states, "All new original publication 1959."

This, Your Honor, will complete the books which were found at the premises 37 West 20th Street.

Justice Breslin: All right. I think this might be a good place to stop unless—Do you expect to be much longer with this witness?

Mr. Stein: Well, not too much longer, it probably would run a half-hour, Your Honor.

Justice Breslin: I have enough reading matter.

Mr. Kern: I just was wondering whether I could read this by tomorrow morning.

(Messrs. Stein and Kern confer off the record with Their Honors.)

Justice Breslin: All right. We will recess until ten o'clock tomorrow morning.

(This is to certify that the foregoing is a true and correct transcript of the within proceeding as recorded by me.) 686

PAUL H. PETERSON
Official Court Reporter

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Justice Breslin: All right. Case on trial.

Court Officer: Twenty-eight—Edward Mishkin.

Mr. Kern: Good morning, your Honors.

Justice Gassman: Good morning, Mr. Kern. 687

Justice Breslin: Good morning.

Mr. Stein: Mr. Levenberg.

MR. NORMAN LEVENBERG retakes the witness stand.

Court Officer: Just have a seat. You are still under oath.

Mr. Stein: People are ready.

Justice Breslin: All right. Proceed.

Mr. Stein: Mr. Kern?

Mr. Kern: Yes, Your Honor.

688 *People's Witness, Norman Levenberg, Direct*

*Direct Examination continued by Mr. Stein:*

Q. Mr. Levenberg, you will recall that yesterday I had shown you a number of books which you identified as having been printed by yourself at the request of Mr. Mishkin, these books having been taken from the premises 37 West 20th Street, is that correct? A. Correct.

Q. I now show you an additional series of books concerning which there has been previous testimony that they were taken from the premises
689 254 West 42nd Street, the Publishers' Outlet. I show you People's Exhibit 43 for identification; and I ask you if you can tell us the approximate date you printed this and the quantity that you printed? A. May, '58, one thousand.

Justice Gassman: What is it, 43?

Mr. Stein: I offer this—43 for identification.

Justice Gassman: Yes. May what?

The Witness: May, '58.

Justice Gassman: How many?

690 The Witness: One thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Same objection?

Mr. Kern: Yes.

Justice Breslin: Same ruling. Received in evidence as People's Exhibit 43. (So marked.) That is "Columns of Agony"? Pardon?

Mr. Stein: Yes, Your Honor, "Columns of Agony."

May the record reflect that the cover of "Columns of Agony" states "Parisian Edition, published by CLA Publications." It

contains—well, the pages are not numbered consecutively, but it is the approximate thickness of most of the preceding exhibits. There is no price stated on the cover or any other place.

Q. Are you familiar with the CLA, C-L-A, Publications, sir? A. No.

Q. And do you know how the C-L-A Publications came to be printed on the cover of this manuscript? A. That was on the other book that we copied. 692

Q. You printed this from another copy, is that right? A. That's right.

Q. I show you People's Exhibit 44 for identification, a book entitled "The Tainted Pleasure;" and I ask you approximately when you printed this and how many copies of it you did print. A. May, '59, a thousand.

Mr. Stein: I offer that volume in evidence.

Justice Breslin: All right. Received in evidence, People's Exhibit 44. (So marked.)

Mr. Stein: Now, as to "The Tainted 693
Pleasure," there is only one copy, so I can't offer Mr. Kern an additional copy. However, sir, if you would like to read that, you—

Mr. Kern: Well, I will just have to forego the pleasure of reading that one, Judge.

Mr. Stein: The cover of "The Tainted Pleasure" states "Limited edition, fully illustrated." No name or address of a publisher—oh, yes. On page two there appears the words, "The BNB Publishing Company, New York, New York."

Q. Sir, are you familiar with the BNB Publishing Company? A. No, I am not.

Q. Do you know how the name BNB Publishing Company came to appear on page two of this manuscript? A. I think this was another book we copied.

Q. This was another book you copied? A. I think so.

Q. The author of this book is a Brutus N. Bloodley, is that correct? A. I wouldn't know.

695 Q. Well, that's what it states on the cover, is that right? A. That's what it states, but—

Mr. Stein: May the record reflect that the initials in the title are the first initials of the author's names, BNB, Brutus N. Bloodley.

Justice Gassman: Price?

Mr. Stein: There is no—the price of "five dollars" appears on the cover of this volume. These appear to be a series of stories. This book is slightly thinner than the previous volumes, containing what appears to be approximately 80 pages.

696 Q. I show you People's Exhibit 45 for identification; and I ask you, sir, approximately how many copies of this you printed and the approximate date you did so? A. May, '58, one thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received, People's Exhibit 45. (So marked.)

Mr. Stein: People's Exhibit 45 contains the words "Capitol Publishing Company, Washington, D. C." on the cover.

Q. Sir, are you familiar with a Capitol Publishing Company? A. No, I am not.

Q. Do you know how the name Capitol Publishing Company came to be printed on this cover? A. It must have been on another book that we copied.

Q. You are not at all acquainted with any Capitol Publishing Company? A. No.

Mr. Stein: May the record reflect that this volume contains 83 pages of manuscript and an additional approximately 10 698
pages of pictures. There is no price appearing on the cover. However, there is an additional cellophane copy which bears the price "four dollars"—two cellophaned copies which bear the price "four dollars" in crayon on the cellophane cover.

Q. I show you People's Exhibit 46 for identification, sir; and I ask you the approximate time you printed this and the number that you printed? A. August, '59, one thousand.

Q. Now, sir, Exhibit 46 is a black and white —small black and white book, is that correct? 699
A. Correct.

Justice Gassman: Wait a minute. 46 does not appear upon your chart.

Mr. Stein: 46 would be on the first page, Your Honor, I believe, coinciding with Exhibit number 14, which was taken from 37 West 20th Street, "The House of Torture."

Justice Breslin: Well, we have already received in evidence a copy of that as Exhibit 14, I think.

Mr. Stein: As Exhibit 14, yes.

700 Justice Breslin: Yes.

Mr. Stein: And that was taken from 37 West 20th Street, where the defendant is charged with possession with intent to sell.

This was taken from Publishers' Outlet.

Justice Breslin: It is the same as Exhibit 14.

Mr. Stein: That's correct, Your Honor.

Justice Breslin: All right.

701 Mr. Stein: And may the record so reflect.

Q. At this time, Mr. Levenberg, I show you Exhibit number 47 for identification, a book entitled "Bound in Rubber"—48 for identification, a book entitled "Arduous Figure Training at Bondhaven"—49 for identification, a book entitled "Return Visit to Fetterland"—and 50 for identification, a book entitled "Woman in Distress." You previously testified, sir, that black and white books of this type were all printed at approximately the same time, is that correct? A. That's right.

702 Q. And when is the approximate time that Exhibits 46 through 50 for identification, inclusive, were printed? A. July and August of '59.

Q. And the approximate quantity of each? A. A thousand of each.

Mr. Stein: A thousand. May the record also reflect that each of these five copies was also taken from the warehouse and appears in the appropriate space—Exhibits 14, 15, 16, 17, and 18.

Justice Gassman: Pardon me. Are any of these five exhibits similar to those previously offered?

Mr. Stein: They all are.

Justice Gassman: 46 is what?

Mr. Stein: Is 14.

Justice Gassman: 14.

Mr. Stein: 47—

Justice Breslin: 47 is the same as 15.

Mr. Stein: —"Bound in Rubber."

Justice Gassman: I see.

Justice Breslin: 48 is the same as 16, is that it?

Mr. Stein: "Arduous Figure Training at Bondhaven." 704

Justice Gassman: 49, 17.

Justice Breslin: 50 is the same as 18.

Justice Gassman: 50, 18.

Mr. Stein: That would be "Woman in Distress."

I offer these five exhibits in evidence.

Justice Galloway: That's 19.

Justice Breslin: 18 is "Fearful Ordeal in Restraintland."

Justice Gassman: That's 19.

Justice Galloway: 19.

Mr. Stein: "Woman in Distress" is 50. 705

Justice Galloway: That's right.

Justice Gassman: Same as 19.

Mr. Stein: Same as 19.

Justice Gassman: Yes.

Mr. Stein: I offer each of these in evidence.

Justice Breslin: All right. You have offered them in evidence.

Mr. Stein: Yes.

Justice Breslin: They will be received in evidence as Exhibits 46 to 50 inclusive.

706 *People's Witness, Norman Levenberg, Direct*

(People's Exhibits 46 through 50 for identification marked People's Exhibits 46, 47, 48, 49, and 50 in evidence, respectively.)

Q. I show you People's Exhibit 51 for identification, sir. I ask you the approximate time you printed this and the approximate number that you printed? A. August, '59, one thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received.

707 (People's Exhibit 51 for identification marked People's Exhibit 51 in evidence.)

Mr. Stein: This is a book entitled "Pleasure Parade, Volume 4."

Justice Breslin: That is received in evidence as People's Exhibit 51.

Mr. Stein: May the record reflect that Exhibit Number 51 contains the name Nutrix Publishing Company, 35 Montgomery Street, Jersey City, New Jersey. We do not charge a violation of the General Business Law. There are 95 pages.

Justice Gassman: Price?

708 Mr. Stein: The price appears on page two, "'Pleasure Parade,' which contains stories and letters that are bound to please. The price is six dollars for each volume. We have Volumes 1, 2, 3 available."

Q. I show you People's Exhibit 52 for identification, "Pleasure Parade, Volume Number 3"; and I ask you, sir, the approximate time that you printed this and the number of copies that you printed? A. August, '59, one thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received in evidence as People's Exhibit 52. (So marked.)

Mr. Stein: People's Exhibit 52 also contains the name and address of the Nutrix Publishing Company. We do not allege a violation of the General Business Law. There are 94 pages, and the price as stated in the previous volume is six dollars, and as stated on the inside part of the front cover of this volume. 710

Q. I show you People's Exhibit 53 for identification; and I ask you the approximate time you printed this volume and the number of books you printed? A. August, '59, one thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received in evidence as People's Exhibit 53. (So marked.)

Justice Galloway: Is that "Pleasure Parade—"

Mr. Stein: "Pleasure Parade, Volume Number 2." "Pleasure Parade, Number 2" contains the name and address of the Nutrix Publishing Company. We do not allege a violation of the General Business Law. It contains 94 pages, and the price is printed, as listed on the two previous exhibits, and in addition on page 3 of this exhibit, is six dollars. 711

Q. I now show you Exhibit 54 for identification, sir, "Pleasure Parade, Volume Number 1," which also has been listed as a prior exhibit with the books seized at the warehouse; and I ask you

712 *People's Witness, Norman Levenberg, Direct*

the approximate number of volumes of this book which you printed and the approximate time you did so? A. August, '59, one thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received in evidence as People's Exhibit 54. (So marked.)

Q. I show you People's Exhibit 55 for identification, sir; and I ask you the approximate time you printed this volume and the approximate
713 number of copies you printed, this book being entitled "Sorority Girl's Stringent Initiation"? A. August, '59, one thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received as People's Exhibit 55. (So marked.)

Mr. Stein: People's Exhibit 55 contains the name and address of the Nutrix Publishing Company. We do not allege a violation of the General Business Law. It contains 62 pages. There is no price listed for this particular volume.

714 Q. I show you People's Exhibit 56 for identification; and I ask you the approximate time that you printed this volume and the number of which you printed? A. August, '59, one thousand.

Mr. Stein: "Terror at the Bizarre Art Museum," I offer this in evidence as Exhibit 56.

Justice Breslin: All right. Received as People's Exhibit 56. (So marked.)

Mr. Stein: "Terror at the Bizarre Art Museum" bears the name and address of the Nutrix Publishing Company of New Jersey. We do not allege a violation of

the General Business Law. It contains 62 pages. This particular volume does not contain the price.

Q. I show you People's Exhibit 57 for identification, a book entitled "Screaming Flesh," which has also been previously introduced as having been also seized at the warehouse. I ask you, sir, how many copies of this book you printed and the approximate time you did so? A. I haven't got that on my list.

Q. Well, do you recall approximately when you 716
printed "Screaming Flesh"? A. Yes. I would say May of '59, and I did a thousand of them.

Mr. Stein: Approximately one thousand. I offer this in evidence.

Justice Breslin: All right. Received as People's Exhibit 57. (So marked.)

Mr. Stein: I have already read into evidence whether or not this states the name and address of the publisher and other pertinent information.

Q. I show you People's Exhibit 58 for identifi- 717
cation, which has also been previously introduced, sir; and I ask you the approximate time you printed this volume and the number of which you printed? A. January of '58, twenty-five hundred.

Mr. Stein: I offer this in evidence.

Justice Breslin: What date?

The Witness: January, '58.

Justice Gassman: How many copies?

The Witness: Twenty-five hundred.

Justice Breslin: All right.

Mr. Kern: May I make the same objection on this case, if Your Honor please.

Justice Breslin: Yes. Same ruling.

Mr. Kern: Thank you. Exception.

(People's Exhibit 58 for identification received and marked People's Exhibit 58 in evidence.)

Mr. Stein: Pertinent information relative to Exhibit 58 has already been read into evidence.

719

Q. I show you People's Exhibit 59 for identification, sir. I ask you the approximate time you printed this and the approximate number you printed? A. March of '58, twenty-five hundred.

Mr. Stein: I offer this in evidence.

Justice Breslin: "Masque."

Mr. Stein: "Masque."

Justice Gassman: 25.

Justice Breslin: 25.

Mr. Kern: Same objection.

Justice Breslin: January, '58?

720 Mr. Kern: March of '58.

Q. March, '58? A. March, '58.

Justice Breslin: All right, the same ruling.

Mr. Kern: Exception.

(People's Exhibit 59 for identification received and marked People's Exhibit 59 in evidence.)

Q. Mr. Levenberg, if this volume, "Masque," had been given by you to have the manuscript typed on March 1st, approximately when would you receive it in return in the normal course of business?

Mr. Kern: I object to that. There is no proof in the record that he did give the manuscript to anybody. This is a hypothetical question. And I respectfully submit there is no foundation laid for it at all.

Justice Breslin: Sustained.

When did you receive the manuscript in this case, do you recall?

The Witness: I don't recall exactly.

722 Q. Mr. Levenberg, approximately how long a period of time would intervene in any case between the period in which you gave a manuscript to a typist and the time in which the manuscript was returned to you to be offset? A. A week or two.

Mr. Kern: Just a minute. I respectfully object to that.

Mr. Stein: May I state, Your Honor, that I intend to introduce witnesses who will testify to the time after which this document was typed. This is not a hypothetical question.

723

Mr. Kern: Well, you can do it through those witnesses, but not in this form.

Justice Breslin: It all depends, too, wouldn't it, on the number of circumstances —the amount printed or ordered, whether it would be twenty-five hundred, or two or five thousand?

Mr. Stein: Not in so far as the time that the typist would take to return the document to the witness. And if Your Honor wishes, I will ask him the minimum amount of time that elapses between the time a typist—

Justice Breslin: Well, overruled. We will take it for what it is worth.

Mr. Kern: Exception.

Q. What is the minimum amount of time that would elapse between the time you turn a book over to a typist and the time it was returned to you, sir? A. I would say about a week.

Q. And approximately how long would it then take you to print a volume such as "Masque"? A. Well, depending on how fast I worked. Nor-
725 mally, I would say it would take about two weeks.

Q. What is the minimum amount of time? A. I could knock out a book like that in a week's time.

Mr. Stein: I offer this in evidence.

Justice Gassman: One week for typing and one week for the printing?

The Witness: Correct.

Justice Breslin: That's depending, of course, on the size of the volume, is that right?

The Witness: That's right. Depending on size
726 and amount of work. Some of these covers require more time than other covers.

Justice Galloway: Wouldn't the quantity also depend on how long it would take?

The Witness: No. The quantity wouldn't make much difference. Once it goes on the press, the press just knocks it off fast. That's the fastest part of it.

Justice Gassman: Tell me this: Have you got your work sheets here showing how long it actually did take you?

The Witness: No.

Justice Gassman: What happened to those work sheets? Did you keep them.

The Witness: I never had work sheets.

Justice Gassman: Well, you are relying now entirely upon your best recollection as to what happened, or may have happened, in 1958 and 1959?

The Witness: That's correct.

Justice Gassman: Did you have any other work at that time besides the work that the defendant, you say, ordered from you?

The Witness: Yes, we had some other work. 728

Justice Gassman: All right.

Q. Mr. Levenberg, approximately how many —You have already testified that you printed at least fifty of these books for Mr. Mishkin, is that correct? A. I think I did more than fifty books for Mr. Mishkin.

Q. Can you say definitely that the minimum amount of time it takes you to print one of these books, no matter what book it may be, is one week? A. That's right.

Q. Can you say definitely that the minimum 729 amount of time that elapses between the time you give a manuscript such as this to the typist and it is returned to you is one week? A. That's correct.

Mr. Stein: I believe this has been offered in evidence, is that right?

Justice Breslin: Yes. 59?

Mr. Stein: That's correct, Your Honor.

Justice Breslin: All right. 59. It has been received.

Justice Gassman: Yes.

Justice Breslin: I think I indicated that.

Q. I show you People's Exhibit 60 for identification, a book entitled "Temptation." I ask you, sir, approximately how many copies of this you printed and the approximate time you did so? A. March, '58, twenty-five hundred.

Justice Gassman: What number is that, please?

Mr. Stein: 60 for identification, "Temptation."

Justice Breslin: Twenty-five hundred.

731 Justice Gassman: March, '58?

The Witness: Correct.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received as People's Exhibit 60. (So marked.)

Justice Galloway: All right.

Mr. Stein: "Temptation" does not bear the name or address of any publisher. It contains 134 pages, and the price four dollars is marked on the cover.

Justice Breslin: All right. Suppose we stop here for a minute.

732 (Another case on the day's calendar is disposed of at this point.)

Justice Breslin: All right. Case on trial. All right.

Q. I show you People's Exhibit 61 for identification, sir, a series of cartoon sheets entitled "Peggy's Distress on the Planet Venus." I ask you approximately when you printed this and how many copies of it you printed? A. That was May and June of '59. Five hundred.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received as People's Exhibit 61. (So marked.)

Mr. Stein: People's Exhibit 61 does not contain the name or address of a publisher. It consists of a series of cartoon sheets, drawings and illustrations, and running narratives consisting of 12 pages. There is no price.

Justice Gassman: This is not included in your General Business Law counts?

Justice Galloway: Your chart doesn't show it, anyway. 734

Mr. Stein: Oh, in that case it is not.

Justice Gassman: Twelve pages. Any price on it?

Mr. Stein: No price on it, Your Honor.

Justice Gassman: No price.

Q. I show you People's Exhibit 62 for identification, a series of cartoon sheets entitled "Ways of Discipline" and I ask you the approximate time you printed this and the number of which you printed? A. May or June of '59. Five hundred.

735

Mr. Stein: I offer this in evidence.

Justice Breslin: Received as People's Exhibit 62. (So marked.)

Mr. Stein: People's Exhibit 62 also is not found under the General Business Law violation alleged in the information.

There are 47 separate pages; and no name or address of a publisher appears, nor does the price appear. 48 separate pages; actually, there are 24 pages divided into 2 parts consisting of 48 separate series of illustrations and narrative.

736 *People's Witness, Norman Levenberg, Direct*

Q. I show you People's Exhibit 63 for identification, a cartoon series entitled "Mrs. Tyrant's Finishing School." I ask you the approximate time you printed these and the number of which you printed? A. May and June, '59. Five hundred.

Mr. Stein: In this case, Mr. Kern, there's only one additional copy of this particular volume, which I'll offer to the Court.

Mr. Kern: That's all right.

737 Mr. Stein: I offer this in evidence.

Justice Breslin: Received as People's Exhibit 63. (So marked.)

Mr. Stein: No violation of the General Business Law is alleged for Exhibit 63. The name "Irving Cla, all rights reserved" appears on at least the last page of this document and several of the others. There are 12 pages and no price given.

Q. I show you People's Exhibit 64 for identification, a cartoon series entitled "Perilous Assignment"; and I ask you when you printed this
738 and the number of copies which you printed? A. May or June of '59. Five hundred.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received as People's Exhibit 64. (So marked.)

Mr. Stein: People's Exhibit 64 is not alleged as a violation of the General Business Law. The name "Irving Cla, all rights reserved" appears on each page of it. It consists of 10 pages of a cartoon series, illustrations, and narrative. There is no price which appears here.

Q. I believe you have previously testified, Mr. Levenberg, to People's Exhibit 65 for identification, "French Girl on the Stairs"—

Justice Gassman: Wait. Before you get to 65, any price?

Mr. Stein: No price.

Justice Gassman: No price.

Mr. Stein: No price.

Justice Gassman: How many pages?

Mr. Stein: Ten pages.

740

Q. 65 for identification, you have previously testified to, I believe, Mr. Levenberg, a book entitled "The French Girl on the Stairs, Part 2." A. Right.

Q. And approximately when did you print this, and how many? A. March of '58. Twenty-five hundred.

Mr. Stein: I offer this in evidence.

Mr. Kern: Same objection in this case, if the Court please.

Justice Breslin: Wait a minute. You are offering this as 65, the same as 35?

741

Justice Galloway: No. The same as 36.

Mr. Stein: "Part 2."

Justice Galloway: "The French Girl on the Stairs, Part 2" is 36.

Justice Breslin: 36. All right. Received in evidence as People's Exhibit 65. (So marked.)

Q. 66, "Tattle Tales," 67, "Look at Her Motor Turn Over," these two books you have also previously testified to, is that correct, Mr. Levenberg? A. Right.

742 *People's Witness, Norman Levenberg, Direct*

Mr. Stein: Now, I offer each of these into evidence. We allege only violations of the General Business Law.

Justice Gassman: 38 and 66.

Mr. Stein: "Look at Her Motor Turn Over" is 67.

Justice Breslin: They will be received as Exhibits 66 and 67.

(People's Exhibits 66 and 67 for identification marked respectively People's Exhibits 66 and 67 in evidence.)

743

Justice Galloway: They were 38 and 39.

Mr. Stein: He already testified to that.

Mr. Kern: Yes.

Q. Mr. Levenberg, I show you People's Exhibit 68 for identification, a book entitled "Bondage Correspondence"—which Your Honors will find immediately in between two full black lines —and I ask you approximately when you printed this and the number of copies you printed? A. May or June, 1959. Five hundred.

Mr. Stein: I offer this in evidence.

744

Justice Breslin: Received as People's Exhibit 68. (So marked.)

Q. What was the date again, Mr. Levenberg? A. May or June, 1959.

Mr. Stein: Well, People's Exhibit 68 we do not allege violation of the General Business Law. "Bondage Correspondence" consists of 9 pages. There is no price which appears.

Q. Mr. Levenberg, I show you People's Exhibit 69 for identification, a book entitled "Woman

Impelled." I ask you approximately when you printed this and the number of copies which you printed? A. October, '58. A thousand.

Mr. Stein: I offer this in evidence.

Justice Breslin: Received as People's Exhibit 69. (So marked.)

Mr. Stein: Exhibit 69 does not contain the name or address of a publisher. It consists of 143 pages. The price "five dollars" appears on the cover. The first page and the back cover reads as follows: "The 746
poignant story of a man, his marriage, and his wife, who was a nymphomaniac" and then a description of nymphomaniac appears immediately below that on the back cover.

Q. I show you People's Exhibit 70 for identification, Mr. Levenberg; and I ask you approximately when you printed this and the number you printed—a book entitled "Eyewitness." A. December, '58. Thirty-five hundred.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received as 747
People's Exhibit 70. (So marked.)

Mr. Stein: As to People's Exhibit 70, Mr. Kerns, this is the only copy that was taken; and, therefore, we will have only the one copy for the Court. We don't have additional copies for the other two judges to submit in these boxes. That's as to 70, seven-owe.

Exhibit 70 does not contain the name or address of a publisher. It consists of 142 pages. The price "five dollars" is stamped on the cover of the book.

Mr. Kern: May I see that for just a minute? (Book handed to Mr. Kern.)

This is 70, is that right?

Mr. Stein: Yes.

Q. I show you People's Exhibit 71 for identification, Mr. Levenberg, a book entitled "Stud Broad." I ask you approximately how many copies you printed and when you did so? A. June, '58. Thirty-five hundred.

749 Mr. Stein: I offer this in evidence.

Justice Breslin: Received as People's Exhibit 71. (So marked.)

Mr. Stein: Exhibits 69 through 71 were found at the Main Stem Book Store.

Justice Breslin: That's the Main Stem?

Justice Galloway: Main Stem.

Mr. Stein: Yes, Your Honor.

Justice Breslin: Pardon?

Justice Galloway: Main Stem Book Store.

Mr. Stein: Main Stem Book Store.

Justice Breslin: Yes.

750 Mr. Stein: Exhibit 71 does not contain the name or address of a publisher. It consists of 175 pages. The price "five dollars" appears on the cover. The rear cover states, " 'Stud Broad,' the story of the creation of a lesbian, by Justin Kent."

Justice Breslin: How many pages in that?

Mr. Stein: This is 175 pages, Your Honor. Five dollars.

Q. Mr. Levenberg, I show you People's Exhibit 72 for identification. I ask you approximately when you printed this and the number of

which you printed? A. Well, I did a couple of printings on this one, I'm sure.

Q. You did a couple? A. Yes.

Q. Well, approximately how many printings would you say you did? A. Two or three printings on it.

Q. Two or three separate printings? A. Yes.

Q. Do you recall the approximate dates? A. Anywheres from April to August of '58.

Q. April to August of '58? A. Yes.

Q. And approximately what is the total that 752
you printed, approximately? A. Well, the first time was twenty-five hundred. After that I think it was a thousand. So it is either thirty-five hundred or forty-five hundred. I'm not sure on that total.

Q. Thirty-five hundred or forty-five hundred? A. Or forty-five hundred. I'm not sure.

Q. Mr. Levenberg, do you know whether you printed this precise volume for Mr. Mishkin, this one I— A. This one I definitely printed.

Q. This particular one? A. That's right.

Q. Now, I show you additional copies of
"Queen Bee" which come in People's Exhibit 73 753
prime for identification. I will ask you to look at these and tell us whether you printed the identical copies of each of those, or are there any copies in there which you did not print, sir? A. I didn't print this one.

Q. At least one copy. How do you know, sir? A. It is not my job.

Q. You can tell— A. Don't look like my job.

Q. —by just looking at the cover? A. Doesn't look like I printed it. Looks like somebody else copied it.

Q. That's all, sir.

Mr. Stein: I offer 72 for identification in evidence.

Justice Breslin: All right. Received as People's Exhibit 72. (So marked.)

Mr. Stein: "Queen Bee", on the back cover, has the name "Rainbow Publishing Company, Brooklyn, New York."

Q. Mr. Levenberg, are you at all in any way familiar with the Rainbow Publishing Company in Brooklyn, New York? A. No, I am not.

755 Q. Are you familiar with any Rainbow Publishing Company? A. No.

Q. Do you know how the name Rainbow Publishing Company came to be on this particular exhibit? A. I'm not sure.

Justice Breslin: You weren't doing business under that name, were you, at the time that you printed these books?

The Witness: No, Your Honor.

Justice Breslin: All right. What was your firm's name at that time?

The Witness: Norman Offset.

756 Justice Breslin: Norman—

The Witness: Offset.

Justice Breslin: —Offset.

Q. To your knowledge, was the defendant doing business under the name of Rainbow Publishing Company, to your knowledge? A. Not to my knowledge.

Mr. Stein: "Queen Bee" contains 176 pages. The price "five dollars" is printed on the cover. The back cover reads as follows: "The kind of book you always wished could be published. Nothing is

hidden, nothing skipped over. Every fact is revealed. The intimate details of life's passionate adventures are told by the most daring, outspoken of modern writers, A. Justin Kent. The censor's hand has not touched this scorching unblushing book. Hot love scenes, forbidden pleasures, the thrills and experiences of sin and sex are offered to you in absolutely uncensored form. A gay, naughty book that never pulls down the shades. A tale that is 758
wilder and more sizzling than a barrel of sly French novels. A Roman orgy is tame compared to some of the bedroom scenes."

Q. Mr. Levenberg, when you testified earlier, you stated that when a manuscript was given to you to be typed you would give it to a particular typist or typesetter, is that correct? A. Correct.

Q. Would you be good enough to tell the Court the names of the typists or the typesetters to which you gave the manuscript? A. Either Dorothy Yeeto of Cold Type or Virginia Admerl of Academey Typing Service. 759

Q. You also stated earlier, Mr. Levenberg that when you had printed a book you would give it to certain binders? A. That's correct.

Q. Would you tell us the name of the binders you used? A. York Bindery and the Hudson Bindery.

Q. York and Hudson binderies.

Justice Gassman: Was the price paid to you, the fifteen cents for some and forty cents for the other, did that include the binding?

The Witness: That included the binding, yes, Your Honor.

Q. Mr. Levenberg, you also testified yesterday concerning the procedure you would follow when these books were sent to you from the binder, and you stated that on various occasions you would send approximately fifty to the Publishers' Outlet and perhaps to another store and the rest would be stored in the warehouse, is that correct? A. That's correct.

761 Q. Did you ever on any occasion do anything else with these books for Mr. Mishkin, the books in evidence? A. Well, a couple of times he had me—he had me deliver some books to some other stores.

Q. Did you ever send books any place else? Speak up loud, please, so we can hear you. A. Well, sometimes he would give me an order—he would give me an order slip, and he would give me a place to send it out of town. I would ship it out of town for him.

Q. How would you ship it out of town? A. Well, we would fill up a couple of cartons or
762 trunks, and we would take it down to the Railway Express of Greyhound and ship it.

Q. Where would you ship it? A. I don't remember all the places we shipped. I know it was sometimes Minneapolis, Saint Paul.

Q. Any other cities that you can recall? A. I am not sure offhand.

Q. Now, Mr. Levenberg, you also testified that Mr. Mishkin would give you drawings which you would then reproduce on the covers of various books, is that correct? A. That's right.

Q. I now show you People's Exhibits 1A through 1L for identification, a series of draw-

ings. I show you People's Exhibit 1 in evidence, a book entitled "Chances Go Round". Mr. Levenberg, I ask you whether you took this series of twelve drawings, 1A through 1L for identification, and reproduced them on a smaller scale within the book "Chances Go Round"? A. Yes.

Q. And these are all found within this book "Chances Go Round", People's Exhibit 1, is that correct? A. That's correct.

Q. And that would commence, would it not, with page 21? A. Yes. That was the first pic- 764
ture.

Q. Page 21 corresponds to People's Exhibit 1A, does it not? A. That's correct.

Q. And so forth? A. (Witness nods his head affirmatively.)

Mr. Stein: I offer People's Exhibits 1A through 1L in evidence.

Mr. Kern: I object to these on the ground that no proper foundation has been laid as yet for the receipt into evidence of these papers.

Justice Breslin: Where did you say you got 765
those, sir?

The Witness: From Mr. Mishkin.

Justice Breslin: He gave them to you?

The Witness: Yes, Your Honor.

Justice Breslin: When did he give them to you?

The Witness: At the same time when he handed me the—the manuscript to do the book.

Justice Breslin: I see. Overruled. We will take them, 1A to 1L—

Mr. Stein: 1A to 1L inclusive, Your Honor.

Justice Breslin: They will be received in evidence, 1A to 1L inclusive.

(People's Exhibits 1A through 1L for identification received and marked People's Exhibits 1A through 1L respectively.)

Mr. Kern: These are all, I suppose—If the Court will remember, I asked for a blanket objection—

Justice Breslin: Yes, you have an objection.

767 Mr. Kern: —in accordance with the motions which were made at the beginning of this trial, and these were received in the light of those objections contained in those motions.

Justice Breslin: Yes, you have an objection.

Mr. Kern: Thank you, sir.

Justice Breslin: And the objection is overruled in each instance, and you have an exception.

Mr. Kern: Yes. Thank you, sir.

Justice Breslin: How many are there, 11 or 12?

768 Mr. Stein: Twelve.

Q. Mr. Levenberg, I show you People's Exhibit 4A for identification and People's Exhibit 4 for identification. Can you identify People's 4A, please? A. You mean this picture here?

Q. Yes, the picture. A. Mr. Mishkin gave me the picture to use as the cover of "Satin Satellite".

Q. Mr. Levenberg, what did you do with this picture as well as the pictures 1A through 1L, or did you do anything with these pictures several months ago? A. I gave them to my lawyer.

Q. What is your attorney's name, sir? A. Louis Field.

Q. And did you give him any directions, or did you request that he do anything? A. I told him to turn them over to the police.

Q. When Mr. Mishkin gave you this drawing, sir, what did he ask you to do with it?

Justice Gassman: What are you referring to now?

Mr. Stein: 4A.

Justice Gassman: 4A. 770

A. He told me to use it as a cover for the book "Satin Satellite".

Q. People's Exhibit 4? A. Yes.

Q. Did you reproduce it on a smaller form on the cover of People's 4? A. That's right.

Mr. Stein: I offer this drawing in evidence as People's Exhibit 4A.

Justice Breslin: All right. The same objection?

Mr. Kern: Yes. Thank you.

Justice Breslin: Same ruling. All right, People's Exhibit 4A in evidence. (So marked.) 771

Mr. Kern: May I ask the Court, also, to consider an objection on these cases made with particular reference to objections which were taken to the receipt in evidence of books which, according to the witness, were published prior to the two-year period preceding the date of the presentation of the information.

Justice Breslin: Yes, yes.

Mr. Kern: Thank you.

Q. Mr. Levenberg, I show you People's Exhibit 21A for identification, and I show you People's Exhibit 21. Can you identify People's Exhibit 21A, sir? A. It is a picture that Mr. Mishkin gave me.

Q. And can you tell us anything else about the picture? A. He told me to use it for the cover for the "Screaming Flesh".

Q. I show you People's Exhibit 21. Is that the book you were to make a cover of? A.
773 That's the one.

Q. And did you actually reproduce People's Exhibit 21A on the smaller scale on the cover of People's Exhibit 21? A. Yes.

Q. Mr. Levenberg, the colors which appear on People's Exhibit 21A are not the same as the colors which appear on the cover of People's Exhibit 21, is that right? A. That's correct.

Q. Can you explain that, please? A. Mr. Mishkin left the colors to my discretion.

Q. And what do you—or, what did you do? A. Made it—made a two-color job out of it instead of one.

774 Q. You can do that through various chemical processes, is that correct? A. That's right.

Mr. Stein: I offer People's Exhibit 21A into evidence.

Justice Breslin: All right. Received as People's Exhibit 21A. (So marked.)

Q. Mr. Levenberg, I show you People's Exhibit 23A and 23B for identification; and I ask you whether you can identify these? A. This looks like—this was on a thin book.

Q. What are they, sir? A. They are pictures that Mr. Mishkin gave me. Yes, that's the book "So Firm and So Fully Packed".

Q. People's Exhibit 23? A. That's right.

Q. He gave you these pictures for what purpose, sir? A. To reproduce for the cover.

Q. People's Exhibit 23? A. That's right.

Q. Did you, indeed, reproduce People's Exhibit 23A for identification as the cover of People's Exhibit 23? A. I did.

Q. And did you also reproduce People's Exhibit 23B for identification as People's Exhibit —on the back cover of People's Exhibit 23? A. Yes, I did. 776

Mr. Stein: I offer 23A and 23B in evidence.

Justice Galloway: 23A is the cover of 23?

Mr. Stein: That's correct, the front cover. And 23B is the back cover of the same volume.

Justice Breslin: All right.

Q. The colors here, sir, are not the same colors as are in the drawing, is that correct? A. That's right.

Q. That was left to your discretion, and you handled it accordingly? A. That's right. 777

Justice Breslin: All right. You are offering both of those?

Mr. Stein: Yes, Your Honor, A and B.

Justice Breslin: They will be received as Exhibit 23A and 23B. (So marked.)

Q. I show you People's Exhibit 24A for identification, and I ask you whether you can identify this, sir? A. Yes. That's another picture that Mr. Mishkin gave me to put on the cover of "I'll Try Anything Twice".

Q. That's People's Exhibit 24, is that correct?— A. Correct.

Q. —which I show you now. People's Exhibit 24A is not in the same coloring as 24, is that correct? A. I think I did the book more than once. The first time I think I did a better job on the cover,—

Q. People's Exhibit— A. —more exact.

Q. People's Exhibit 24A also has certain pictures and writing which does not appear on
779 People's Exhibit 24, the actual cover, is that correct? A. That's right.

Q. And that would consist of the title, which is "Secret Affairs" on 24A, the name "Gene Bilbrow" on the lower left-hand corner of the picture, and a certain picture of a male and a female in an embrace on the upper left-hand corner of the picture, is that correct? A. That's correct.

Q. Can you explain the difference, sir? A. Well, the first time I did the job I did the job right; and then we had a rerun on it, and I couldn't find the old negatives, and I didn't want
780 to go through all that bother, because to print up a job like that there's a lot of time and money involved; and Mr. Mishkin said it would be all right to just throw it in, throw it together a little faster.

Q. Well, how did you eliminate certain items? A. How do you eliminate it?

Q. How did you eliminate those items? A. Just by putting a piece of goldenrod over it when you block out. When you expose the plate, you just block it out.

Q. With what is that? A. A piece of goldenrod, we call it.

Mr. Stein: I offer 24a in evidence.

Justice Breslin: All right. Received as People's Exhibit 24A in evidence. (So marked.)

Q. Mr. Levenberg, I show you People's Exhibit 25A and 25B for identification—

Mr. Kern: Well, now, Your Honor, may I, at this point, ask the Court and I do this most respectfully, to instruct the district attorney to exhibit the document 782
which he proposes to offer in evidence as a result of this witness' testimony and at that time to refrain from showing him any document which has already been received in evidence; and I respectfully make this motion in connection with—or for the purpose of testing the credibility of this witness, which is always for the Court to determine.

Mr. Stein: I will be very happy to do that, Judge.

Justice Breslin: All right.

Q. I show you People's Exhibit 24A and— 783
25A and 25B for identification, sir; and I ask you if you can identify these? A. One of these is 'Masque". These pictures were given to me by Mr. Mishkin, and—Can I refer to my list?

Mr. Kern: No.

Q. No. Mr. Levenberg, what are they, generally speaking? What are they? A. They are covers. One of these is for "Masque", I know.

Q. They are pictures, are they not? A. They are pictures for covers for the book—was for "Masque".

Q. Forget the title of the book at the present time. Where did you get these? A. I got them from Mr. Mishkin.

Q. How do you know you got them from Mr. Mishkin? How do you know you got them from Mr. Mishkin? A. Because I remember he gave them to me.

Q. You remember that specifically? A. Yes.

Q. Anything particular about them that you remember? A. Anything particular? Well, they
785 were just the same as all the others he gave me, the same as all the other covers he gave me. Nothing particular.

Q. Now, sir, on one occasion, did you appear in my office? A. Yes, I appeared in your office.

Q. And did you look at certain drawings? A. Yes.

Q. And did I ask you to do anything concerning those drawings? A. You asked me to mark them.

Q. And did you do so?

Mr. Kern: Now, if Your Honor pleases,
786 I respectfully object to the witness reading from anything not in evidence.

Justice Breslin: Yes. Sustained. Strike out that last answer.

Q. Do you recall any—I will ask a question I asked previously, Your Honor—Do you recall anything specifically about this picture which causes you to say that Mr. Mishkin gave it to you, other than the fact that you just remember the picture as it is, as you stated? A. Well, I don't understand what you're getting at here. I don't understand.

Justice Gassman: How do you know that this is the picture that Mr. Mishkin gave to you? Now, that's a simple question. What is there about the picture—

The Witness: Well, when I first—I know I signed the backs of these when I turned them over to—when I was up at Mr. Stein's office.

Q. And do your initials appear on the back?

Mr. Kern: Now, I—just a minute.

A. Yes, my initials are on the back. 788

Mr. Kern: I object to this.

Justice Breslin: Yes. Sustained. Strike it out.

You know that Mr. Mishkin gave you that picture, is that right?

The Witness: That's right.

Justice Breslin: To use on the cover of one of these books you were printing at his request, is that right?

The Witness: That's right.

Justice Breslin: Do you recall the name of the book that you used it on? 789

The Witness: I'm saying—well, "Masque" was definitely one of the books.

Justice Breslin: All right.

Q. I show you People's Exhibit 25, a book entitled "Masque". I ask you if the front cover of "Masque" is a cover which you reproduced on a smaller scale from People's Exhibit 25A for identification. A. Yes, that's it.

Mr. Stein: I offer 25A for identification in evidence.

790 *People's Witness, Norman Levenberg, Direct*

Justice Breslin: Received as People's Exhibit 25A. (So marked.)

Q. I show you 25B for identification; and I ask you if you can recall the title of the book for which you made this—which you used?

Mr. Kern: No, no. May I ask that the witness not look at the reverse side.

Justice Breslin: Well, don't—

Mr. Stein: There's no name of the book appearing on the reverse side.

791 Mr. Kern: There may be something else that I wouldn't like that witness to see.

Justice Breslin: All right.

Mr. Stein: All right.

Q. Do you recall the book that you used this for? A. Do you want to wait and give me time to think. I may think of it. I don't know how much time you want to give me.

Q. Just think of it, Mr. Levenberg. Take all the time you want. A. It was another book. It was turned out exactly just about the same time. As a matter of fact, it was a very similar cover.

792 These two covers were given to me at the same time.

Mr. Kern: I move to strike that out. The question was, what book was this document given to the witness for—for which particular book.

Justice Breslin: Yes. Sustained. Strike it out as not responsive.

Do you recall the name of the book for which you used it?

The Witness: Offhand, I don't remember it.

Justice Breslin: All right.

Q. Mr. Levenberg, I show you People's Exhibit 25 for identification; and I show you page two thereof. I ask you if an illustration which appears on page two was reproduced by you on a smaller scale—

Mr. Kern: Well, now,—

Q. —from People's Exhibit 25B?

Mr. Kern: —I object to it, but, of course, the witness now knows the answer. 794

Mr. Stein: Well, I think I have exhausted his recollection.

Mr. Kern: He's been shown—

Justice Breslin: Your objection is overruled.

Mr. Kern: I respectfully except.

A. Yes. That's the picture that appears on the inside.

Q. A portion of that picture, is that correct? A. A portion of it, that's correct.

Q. I show you page three of the same exhibit, and— A. That's the balance— 795

Q. I ask you if a portion of page three was reproduced by you on a smaller scale from Exhibit 25B? A. That's the balance of the picture.

Q. And I show you page 118, and I ask you whether the picture which appears on page 118 was reproduced by you on a smaller scale from a portion of People's Exhibit 25B for identification? A. That's correct.

Mr. Stein: I offer 25B for identification into evidence.

Justice Breslin: Received as People's Exhibit 25B. (So marked.)

796 *People's Witness, Norman Levenberg, Direct*

Mr. Stein: May the record reflect that "Masque" also appears as Exhibit Number 59 and that book is identical to the exhibit I just referred to—25.

Q. Mr. Levenberg, I show you People's Exhibit 26 for identification; and I ask you if you can identify this? A. That's a picture that Mr. Mishkin gave me to put on the cover of one of his books.

Q. Do you recall the title of the book, sir?

797

Justice Gassman: 26A.

Mr. Stein: 26A.

A. I'm not positive. I think this is "Catanis". I am not positive. I may be wrong.

Q. I show you People's Exhibit 26, a book entitled "Catanis"; and I ask you if you reproduced the cover of the book to a smaller scale from People's Exhibit 26A for identification? A. That's correct.

Mr. Stein: I offer 26A in evidence.

Justice Breslin: Received in evidence as People's Exhibit 26A. (So marked.)

798

Q. Mr. Levenberg, I show you People's Exhibit 28A for identification—

Justice Breslin: What is the number?

Mr. Stein: 28A for identification.

Q. —and I ask you if you can identify this? A. That's another picture that Mr. Mishkin gave me; and it says "Betrayal" up here, so I guess it was for the book "Betrayal".

Q. He asked you to do what, if anything, with this? A. He asked me to make a cover.

Q. I show you People's Exhibit 28 for identification, a book entitled "Betrayal"; and I ask you whether you reproduced, on a smaller scale on the front and back covers of this book, People's Exhibit 28A? A. I did.

Mr. Stein: I offer 28A in evidence.

Justice Breslin: Received as People's Exhibit 28A. (So marked.)

Q. Mr. Levenberg, I show you People's Exhibit 29A; and I ask you if you can identify this? A. It is another picture that Mr. Mishkin 800
gave me. Do you want the book?

Q. It is a picture Mr. Mishkin gave you? A. It is a picture, yes.

Q. For what purpose, if any? A. To put on a book—cover of a book.

Q. And do you recall the name of the book? A. I—I think it's "Swish Bottom".

Q. I show you People's Exhibit 29, a book entitled "Swish Bottom"; and I ask you whether the cover of this book is a cover which was reproduced on a smaller scale from People's Exhibit 29A for identification? A. That's correct. 801

Mr. Stein: I offer 29 for identification in evidence—29A for identification.

Justice Breslin: Received as People's Exhibit 29A. (So marked.)

Q. I show you People's Exhibit 30A for identification, sir; and I ask you if you can identify that, sir? A. It's a picture that Mr. Mishkin gave me. I can't think of the name of the book for this one.

Q. You can't recall it, is that right? A. I can't recall it.

802 *People's Witness, Norman Levenberg, Direct*

Q. I show you People's Exhibit 30 for identification, and I show you not the cover of this book, but page 129 of this book; and I ask you whether you reproduced, on a smaller scale, People's Exhibit 30A for identification on page 129? A. Yes, that's it.

Mr. Stein: I offer 30A for identification in evidence.

Justice Breslin: Received as People's Exhibit 30A in evidence. (So marked.)

803 Q. Mr. Levenberg, I show you People's Exhibit 34A for identification. I ask you if you can identify this? A. It's a picture that Mr. Mishkin gave me.

Q. For what purpose, sir? A. I think one of the books.

Q. What did he give you the picture for? A. To put on as the cover of a book.

Q. Do you recall the name of the book? A. Well, was it "Temptation"? I am guessing. It's just a guess.

Q. I show you People's Exhibit 34 in evidence,
804 a book entitled "This Way Down";— A. "This Way Down".

Q. —and I ask you whether you reproduced the cover of this book on a smaller scale from People's Exhibit 34A for identification? A. That's correct.

Mr. Stein: I offer 34 in evidence.

Justice Breslin: 34A.

Justice Galloway: 34A.

Justice Gassman: 34A.

Mr. Stein: 34A.

Justice Breslin: All right. Received in evidence, People's Exhibit 34A. (So marked.)

Q. I show you People's Exhibit 37A for identification, and I ask you if you can identify this, Mr. Levenberg? A. It's a cover that Mr. Mishkin gave me.

Q. For what purpose, sir? A. To put on a book. I'm just guessing on these here, because I don't really remember. I don't remember that accurately. Do you want me to just take a guess? 806

Q. Well, do you recall? A. No. I wouldn't know exactly which book this was for.

Justice Breslin: You said this was a cover he gave you.

The Witness: Yes.

Justice Breslin: Was it a cover or a drawing?

The Witness: It was a drawing to be made into the cover for a book.

Justice Breslin: You don't recall offhand the —Withdrawn. Did you use that?

The Witness: I know I used it.

Justice Breslin: In printing one of these 807 books?

The Witness: I definitely used this drawing, and that was one of my covers.

Justice Breslin: But you don't recall the name of the book, is that right? If you don't recall, say so.

The Witness: Offhand, I wouldn't remember, offhand, exactly.

Justice Breslin: All right.

Q. I show you People's Exhibit 37 in evidence, and I ask you if People's Exhibit 37A was

reproduced by you on a smaller scale as the cover of People's Exhibit 37? A. That's it.

Q. Now, People's Exhibit 37A has a cellophane flap which is adjustable, is that correct, Mr. Levenberg? A. That's right.

Q. Would you explain the significance of this? A. Well, that's an overlay; and we photograph this overlay, and it gives us the background coloring that you see here.

Q. In other words, the yellow coloring which
809 appears on the front cover of People's Exhibit 37? A. That's right.

Q. I show you the back cover of People's Exhibit 37, and I ask you whether that was reproduced on a lesser scale from People's Exhibit 37A without the benefit of the overlay? A. That's correct.

Mr. Stein: I offer 39A—rather—

Justice Galloway: Wait a minute.

Justice Breslin: 37A.

Justice Gassman: 37A.

Mr. Stein: 37A in evidence.

Justice Breslin: All right. Received as
810 People's Exhibit 37A. (So marked.)

Q. I show you People's Exhibit 60A for identification, Mr. Levenberg. I ask you whether you can identify this? A. That's a picture that Mr. Mishkin gave me to put on the cover of one of his books.

Q. And do you recall the name of the book, sir? A. I think this is "Temptation".

Q. I show you People's Exhibit 60, a book entitled "Temptation"; and I ask you if the cover of this book was reproduced on a smaller scale from People's Exhibit 60A? A. That's correct.

Mr. Stein: I offer 60A in evidence.

Justice Breslin: All right. Received in evidence as People's Exhibit 60A. (So marked.)

Q. Mr. Levenberg, I show you People's Exhibit 70A in evidence; and I ask you—for identification; and I ask you if you can identify this? A. That's a picture that Mr. Mishkin gave me to produce on the cover of "Eyewitness".

Q. I show you People's Exhibit 70 in evidence, and I ask you—a book entitled "Eyewitness", and I ask you whether the cover thereof was reproduced by you on a smaller scale from People's Exhibit 70A for identification? A. That's correct. 812

Mr. Stein: I offer 70A for identification in evidence.

Justice Breslin: All right. Received, People's Exhibit 70A. (So marked.)

Q. Mr. Levenberg, I show you People's Exhibit 71A for identification; and I ask you if you can identify this, sir? A. It is another picture that Mr. Mishkin gave me to put on the book "Stud Broad", to use as a cover. 813

Justice Gassman: On the back cover, the cover inside, or where?

The Witness: On the cover of "Stud Broad".

Q. I show you People's Exhibit 71 for identification—71 in evidence, a book entitled "Stud Broad". I ask you whether the cover of this book was reproduced on a smaller scale from People's Exhibit 71A? A. That's correct.

Mr. Stein: I offer 71A in evidence.

Justice Breslin: Received as People's Exhibit 71A. (So marked.)

Q. Mr. Levenberg, I show you People's Exhibit 72A for identification. I ask you whether you can identify this, sir? A. Mr. Mishkin gave me this picture to produce as the cover of "Queen Bee".

Q. I show you People's Exhibit 72 for identification, a book entitled "Queen Bee"; and I
815 ask you whether you reproduced this cover on a smaller scale from People's Exhibit 72A for identification? A. Yes.

Mr. Stein: I offer 72A for identification into evidence.

Justice Breslin: Received, People's Exhibit 72A. (So marked.)

Mr. Kern, you won't be distracted by all this around you, will you?

Mr. Kern: Well, I was thinking what nice groupings they would make in certain places.

816 Mr. Stein: Mr. Kern and I have entered into a contractual relationship for the—

Justice Breslin: Let's put them close enough to Mr. Kern.

Mr. Kern: No, they don't disturb me. I'm too old for that.

Justice Breslin: All right.

Q. Now, Mr. Levenberg, you stated that you turned certain drawings, People's Exhibits 1A through 1L and 4A in evidence, over to your attorney to turn over to the police, is that correct? A. That's correct, sir.

Q. And would the same be true for all of the additional drawings which I have shown you this morning? A. That's correct, sir.

Q. I now show you People's Exhibit 73A, B, and C for identification; and I ask you if you can—just if you can identify these three exhibits—73A, B and C? A. These are the slips that Mr. Mishkin gave me when he wanted me to fill an order for him.

Mr. Kern: No. I object to any description or any statement of what's con- 818
tained—

Justice Breslin: These are slips Mr. Mishkin gave you?

Q. Mr. Mishkin gave you these slips, is that right? A. That's right.

Q. And at one time, did you do anything with these slips? A. Well, I—at one time I turned them over to my lawyer.

Q. To do what, sir? A. Give to the police.

Q. When Mr. Mishkin—

Justice Breslin: When did you receive these 819
from Mr. Mishkin?

Q. When did you receive these slips?—

Mr. Stein: —May I ask something preliminary to that?

Justice Breslin: I will withdraw my question. Go on.

Q. Mr. Levenberg, when Mr. Mishkin gave you orders, as you testified yesterday, to remove certain books from the warehouses and deliver them to Publishers' Outlet, would you tell us with a little more exactness how he gave you

those orders? A. Well, he would write them up on slips just like this.

Q. Would he always write them up on slips, sir? A. No, not all the time. If it was a small order for just a few books, he would tell me verbally. He wouldn't have to write it down.

Q. And at other times? A. Other times, if it was a lot of books like this, he would have to write it down.

Q. Now, would you tell us a little more about 73A, B, and C, please? A. Well, he gave me
821 the order. He gave me an order on some books.

Q. Approximately when, sir?

Mr. Kern: May I ask for the date?

Q. Approximately when, sir? A. Here we go with the dates. I say about sometime in, I would say, the beginning of October.

Q. About the beginning of October, what year? A. Yes, it is an approximation.

Q. Of what year? A. That would be '59.

Justice Breslin: Well, was it during the time that you were printing books at his request,
822 during that period? During that period?

The Witness: It was the last—This was the last order he had given me. I didn't print any books after this. But this was the last order he had given me, and I—I took the orders home with me. Now, I was going to pull the order out in the morning; and I got a call at night from Mr. Mishkin—my wife—

Q. You recognized his voice, did you? A. My wife answered the phone first. She said, "Someone wants to talk to you." And it was Mr. Mishkin.

Q. Go ahead. A. He told me not to fill the order, but to come down to the store the next day.

Q. Which store was that, sir? A. Publishers' Outlet.

Q. What did you do, sir? A. The next day I went down to Publishers' Outlet, and he told me I couldn't go near the warehouse any more because he said it was hot.

Q. Go ahead. What else did he say, if anything? A. He just said to stay away from there, 824
don't fill it.

Q. What did you do with the three slips? A. I must have—I must have brought them—I must have left them in my jacket and brought them home, because they ended up in a drawer with all kinds of other papers that my wife takes out of my clothes and puts in drawers. She don't know if they are important or not.

Q. Now, at sometime subsequent to your conversation with Mr. Mishkin relative to staying away from the warehouse, it was hot, did you have another conversation with Mr. Mishkin? A. I had a lot of conversations with Mr. Mish- 825
kin, Mr. Stein. I don't—I had a lot of conversations with him.

Q. Did you have any conversations with Mr. Mishkin, then, relative to any materials you might have in your possession? A. Oh, yes.

Q. Approximately when, sir? A. A little bit —a little bit after this.

Q. About how much afterward? A. A week or two, I suppose. He told me to get rid of everything I had up in my shop.

Q. Go ahead. A. So I—he said, "Because —" he says, "They might—" he says, "The cops

826 *People's Witness, Norman Levenberg, Direct*

might come up there and search." So I got rid of everything I had in the shop.

Q. What sort of items, sir? A. Negatives, plates.

Q. The drawings which you identified— A. Manuscripts.

Q. Manuscripts. The drawings which you identified earlier this morning, sir, how is it you did not destroy these? A. When I moved from 37 West 20th I didn't take them up to my place at 250 West 49th. I took them home, because I
827 just like them; that's all. I didn't want to throw them away.

Q. The three slips of paper, how is it that you didn't destroy those, sir? A. I didn't even know I had it until my lawyer asked me to bring everything up to him.

Q. And Mr. Mishkin handed you these three slips personally, is that correct? A. That's correct.

Mr. Stein: I offer 73A, B, and C in evidence.

Justice Breslin: Show them to Mr. Kern.

828 Mr. Kern: I make the same objection with reference to the constitutional questions which—

Justice Breslin: Yes.

Mr. Kern: —were raised.

Justice Breslin: Same ruling.

Mr. Kern: Exception.

Justice Breslin: They will be received as 73A, B and C.

(People's Exhibits 73A, 73B, and 73C for identification marked as People's 73A, 73B, and 73C in evidence.)

Justice Gassman: Mr. Levenberg, these three slips, Exhibits 73A, B, and C, contain no name as to where any shipments were to be made.

The Witness: That's right, sir, because they were supposed to be shipped right back to his store.

Justice Gassman: Which store?

The Witness: Publishers' Outlet.

Justice Galloway: Go ahead, Mr. Stein.

Mr. Stein: No. I will need—I will need the exhibits. 830

Justice Galloway: Oh, all right.

Mr. Stein: May the record reflect that People's Exhibit 73A for identification bears the name "Motor Turn Over" and that People's Exhibits 39 and 67 consist of two copies of the same book, "Look at Her Motor Turn Over"; that also on the slip is the words, "Painted Pleasure", and that People's Exhibit 44 is a book entitled "Painted Pleasure"; also on this slip is the word "Hollywood Spankers", and that People's Exhibit 41 is a book entitled "Hollywood Spankers"; also on this slip 831 is the name "Educating Edna", and that People's Exhibit 7 is a book entitled "Educating Edna"; also on this slip is the name "Swish Bottom", and that People's Exhibit 29 is a book entitled "Swish Bottom", also on this slip is the name "Screaming Flesh", and that People's Exhibits 21 and 57 are two copies of the same book entitled "Screaming Flesh"; also on this slip is the name "Catanis", and that People's Exhibit 26 is a book entitled "Catanis".

Q. Mr. Levenberg, as to the certain names appearing on the right-hand side of this slip, what are those names, sir? A. Names of books.

Q. Books you were to pull, is that right? A. That's right.

Q. To the left of those names are certain numbers. What are those numbers, sir? A. That's the quantity.

Q. The quantity you were to remove, is that right? A. That's right.

833 Mr. Stein: May I record, also,--

Justice Breslin: The notation "all" before the name of the book, what does that mean?

The Witness: That means we didn't have too many books like that left; and whatever was left, he didn't know—he didn't know exactly how many were left, so he told me to bring them all out.

Justice Breslin: All right.

Mr. Stein: May the record also reflect that People's Exhibit 73B for identification bears the name "Female Sultan"—

834 Justice Gassman: It is no longer for identification. It is in evidence.

Mr. Stein: In evidence. Excuse me, Your Honor. People's Exhibit 73B bears the name "Female Sultan", and that People's Exhibit 3—

Mr. Kern: Now, I object. Counsel is reading something evidently which is not on that exhibit.

Mr. Stein: No, I am not.

Mr. Kern: He adds, "and that People's Exhibit 3 is a book called 'Female Sultan' "; and that's not on that exhibit he is reading.

Justice Breslin: Well, he is directing our attention—

Mr. Stein: If you wish me to, I can merely pick up the book.

Mr. Kern: I think Counsel should simply read a document which is received in evidence; that's all.

Justice Breslin: I don't think it is necessary. In any event, your point is that those slips contain the names of some of these books which have already been received in evidence? 836

Mr. Stein: 20 out of 33.

Justice Breslin: 20 out of 33.

Those lists, 73A, B and C, contain the names of some books which haven't been received here, sir?

The Witness: That's right.

Justice Breslin: Did you have those books in your possesion at that particular time?

The Witness: That's correct, they were in my possession at the time.

Justice Breslin: Did you print those books?

The Witness: Some of them I may have printed. Some of them I may—I probably didn't print, that are on that list. 837

Justice Breslin: Withdrawn. You had control of this warehouse at the time, did you not?

The Witness: That's correct.

Justice Breslin: And where was the warehouse that he told you to stay away from at the time—or, rather, about the time you received these slips?

The Witness: That would be Room 908, 37 West 20th.

Justice Breslin: That's where you maintained your press, is that right?

The Witness: That's right.

Justice Breslin: He told you to stay away from the warehouse—

The Witness: Pardon me, Your Honor. Pardon me, Your Honor. At that time my business was at 250 West 49th, but I still had the warehouse at 908 in 37 West 20th.

Justice Breslin: I see. An upper floor, or in the basement?

839 The Witness: That—when he told me to stay away, it was up in Room 908.

Justice Breslin: 908.

Mr. Stein: Your witness, Mr. Kern.

Justice Breslin: We have a couple of other matters here to be disposed of, Mr. Kern. Suppose we recess now until two-five.

Mr. Stein: Two-five.

(Luncheon recess.)

840

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NORMAN LEVENBERG retakes the witness stand.

Court Officer: Have a seat, please. You are still under oath.

Justice Breslin: Yes.

Mr. Kern: All right?

Justice Breslin: Go right ahead.

Mr. Kern: May I proceed?

Justice Gassman: The case is with you.

Mr. Kern: Yes.

*People's Witness, Norman Levenberg, Cross* 841

*Cross Examination by Mr. Kern:*

Q. Now, Mr. Levenberg, how old are you? A. Thirty-two.

Justice Galloway: I can't hear you.

Q. Keep your voice up.

Justice Galloway: Speak up, please.

A. Thirty-two.

Q. Talk up louder.

842

Justice Galloway: Thirty-two.

Q. And you are married? A. Correct.

Q. You have children? A. That's right.

Q. And you live in— A. Seven Evans Avenue in Farmingdale.

Q. —Farmingdale. You own your own home there? A. That's right.

Q. When did you buy that home? A. Couple of years ago.

Q. About two years ago, is that right? A. That's right, sir.

Q. Now, were you ever known by any other name— A. Other than Norman Levenberg? 843

Q. —than Norman Levenberg? A. No. That's my name—Norman Levenberg.

Q. Did you ever do any business under any other name? A. Well, under a trade name.

Q. No. Under your own name. Using any name other than Norman Levenberg? A. I don't remember. I wouldn't remember doing any other business under any other name.

Q. You don't recall? A. I don't recall.

Q. You mean you may have used some other name, but you don't recall just now? A. I might have been, but I don't recall.

Q. Were you ever convicted of any crime? A. No, sir.

Q. Did you file a certificate of doing business under an assumed name in connection with the name of Norman Offset Company? A. What do you mean by "assumed name"?

Q. Well, Norman Offset Company is a name which you assumed for the purpose of doing this printing business, is that correct? A. That's right. That is correct.

845 Q. Did you file—Is that a corporation, or trade, name? A. Just a trade name.

Q. Did you ever file a certificate in the County Clerk's office— A. Yes, I did.

Q. —that you were doing business under that assumed name? A. I did.

Q. Do you remember when? A. I don't remember when. Well, it was a couple of years ago.

Q. And— A. Well, I can give you—Do you want me to tell you when?

Q. Yes? A. I would say September—September of '57.

846 Q. And on that certificate there appears only your name as the proprietor, is that correct?—Or did you have a partner there? A. No, no. My wife's name as the proprietor.

Q. And her name appears alone, is that correct? A. I think so.

Q. Now, she was never active in your business, was she? A. No, she wasn't.

Q. You have a number of employees—or you had, while you were active as Norman Offset Company? A. A number of employees?

Q. Yes? A. I think we just had one.

Q. Did you have a boy—a delivery boy, or messenger boy? A. Yes. Yes, we had.

Q. You did, didn't you? A. We had a delivery boy.

Q. During all this time with reference to which you testified, is that correct? A. Through most of the time.

Q. And you had someone assisting you in this printing work, or in the preparation of books and papers which you were printing? A. Well, in the time that I was Norman Offset for the 848
first year and a half I had—I was associated with Max Dichter of Automatic Offset. We had an agreement worked out where we shared the profits.

Q. During the relationship with reference to which you testified with the defendant in this case, did you have a helper, or an associate, or a partner, or someone working for you in addition to this boy? A. Well, Max Dichter of Automatic Offset.

Q. And the two of you worked, is that correct? A. That's correct.

Q. And this boy, when did you dispense with 849
the services of this boy, if you remember? A. I didn't dispense with his services. I think he just left us one day.

Q. How long was that about? A. Oh, I think he was with us for about—September of '57, for about six months after that.

Q. Well,— A. We had three different boys. At the time I was with Max Dichter, we had three different boys.

Q. Well, you used these boys to deliver—make deliveries of these books, for instance, that you were talking about, is that correct? A. Oh,

wait a minute. I don't think—let me see if the boys ever made any deliveries to Mr.—You mean to Mr. Mishkin?

Q. To anybody. Mishkin or anybody else you worked for. A. Deliveries of books to anybody?

Q. Books, papers, any printed material? A. Well, they might make a delivery, yes.

Q. Well,—

Justice Galloway: What was the custom generally? Was it delivered by a truck, or what?

The Witness: Delivered by a truck and man almost always.

Justice Galloway: All right.

The Witness: Other deliveries, Your Honor, that Mr. Mishkin got—

Justice Galloway: I would like to get the picture clear. Was this Max Dichter a partner of yours?

The Witness: Well, let me explain it to you.

Justice Galloway: Well, I would like you to.

The Witness: Max Dichter was located up at 37 West 20th under Automatic Offset. I came up there in September, '57. He made a deal with me. My name was Norman Offset. He made a deal with me to come into the same loft he was and we should both bring our work in there and we should work out a deal where we share the profits. And that's what I did.

Justice Galloway: Well, that share the profits is a great idea. Supposing you brought in 80 per cent of the business and he brought in 20, would he get an equal share?

The Witness: That's just what happened. It didn't work out good, because I was bringing in 80 per cent; and I did get disgusted of the whole thing.

Justice Galloway: All right. Go ahead.

Q. And you ended your relationship— A. That's right.

Q. —with Dichter, or whatever his name is, is that correct? A. Yes.

Q. Now, when you had to deliver books that you say were ordered by this defendant, did you deliver them by truck or by messenger? A. When I delivered books to Mr. Mishkin, if you go—At what time are you talking about now?

Q. During the past two years—two years prior 854
to the defendant's arrest. A. Well, all I did for the first year and a half, I would say, was bring them into the warehouse.

Q. To the warehouse? A. Yes. And from the warehouse, Mr. Mishkin had a man working for him who took them out of the warehouse.

Mr. Kern: Well, I move to strike that out, "Mr. Mishkin—" He doesn't know about that.

Justice Galloway: There was someone in the warehouse who delivered it to Mr. Mishkin?

The Witness: That's right. Mr. Mishkin 855
took—

Mr. Kern: Is that motion that you strike out that answer denied?

Justice Breslin: Yes.

Q. You weren't there, yourself, when Mr. Mishkin—Well, I withdraw that. Did you ever, on any single occasion, deliver books to Mr. Mishkin? A. Yes.

Q. When? A. You want me to tell you exactly when?

Q. Yes. I want you to tell me approximately—
A. I can't tell you.
Q. —approximately when and what book?

Justice Galloway: How many deliveries did you make to him? Would you say two, five, twenty?

The Witness: In the time that—that the other fellow was actually taking care of the warehouse I made a few deliveries, but it was—it didn't amount to much.

857 Justice Galloway: In the last six months?

The Witness: In the last six months every book I printed for him I delivered to him personally.

Q. To Mr. Mishkin personally? A. To his store.
Q. No. Now, I ask you, Mr. Levenberg, did you ever personally, yourself, hand any books to this defendant? A. Definitely.
Q. When? A. I put them in his car.
Q. When? A. Yes.
Q. When? A. Yes. You want me to tell you dates?

858 Q. That's exactly what I want. A. All spring and summer I was putting books in his car in the parking lot.
Q. Will you tell me when? A. I can't give you the dates.
Q. All right.

Mr. Stein: The witness has already testified to spring and summer.

Justice Galloway: Spring and summer of what year?

The Witness: '59.

Justice Galloway: All right.

Justice Breslin: Where was the parking lot?

The Witness: Between 8th and 9th Avenues on 42nd Street.

Justice Breslin: A parking lot?

The Witness: A parking lot. He used to keep his car there.

Justice Galloway: What kind of a car was it?

The Witness: A Cadillac.

Justice Breslin: And how did you happen to put books in his car?

The Witness: He just told me, sometimes, to 860
put books in his car, Your Honor.

Justice Breslin: All right.

Q. Now, can you tell us on what other occasion, or occasions, you delivered books personally to the defendant? A. I'd bring them down to the store, and a lot of times he was in the store.

Q. I didn't ask you that. Can you tell us now when you delivered books personally to this defendant?

Mr. Stein: Objection.

A. You want me to give you dates—exact dates 861
when I handed him books?

Mr. Stein: Just one moment. Objection.

Justice Breslin: Hold it.

Mr. Stein: I'll ask that when Mr. Kern says "delivered personally to this defendant" whether he means personally put into the defendant's arms—

Mr. Kern: Exactly.

Mr. Stein: Well, let's ask the question that way.

Mr. Kern: That's exactly what I mean.

A. Yes, I personally put books into the defendant's arms.

Q. When? A. I can't give you exact dates.

Q. What books?

Justice Breslin: What year?

A. What books? All—a lot of black books, the ones I testified to.

Q. All right. When was it? A. When was it?

Q. Yes? A. July, August, June. The "Sultan"—I know the "Sultan" I personally delivered
863 right in his arms.

Q. Where? A. At the Publishers' Outlet Store.

Q. Now—

Justice Galloway: This was in 1959?

The Witness: This is 1959.

Mr. Stein: That would indicate People's Exhibit 3, "Female Sultan".

Q. How many of each one of those books did you deliver, do you remember? A. As soon as I finished a job, I would—my orders were always to take fifty books down to Publishers' Outlet
864 Store and fifty to the Midget Book Store; and that was—and now, after that—

Q. I didn't ask you that. I asked you when you delivered books to him personally, how many of these black and white paper-covered books did you deliver to him personally? A. How many?

Q. Yes? A. Well, I have to say a couple of hundred.

Q. All right. And this was in the year 1959? A. That's correct.

Q. Mr. Levenberg, you started—or your first place of business was located at Number 37 West

20th Street, is that correct? A. I was in business before that, too.

Q. I'm talking about with reference to your transaction with this defendant. A. Well, I did a little business with him under the other—old company, too. Not too much; a little.

Q. Well, you were in business at 37 West 20th Street until the month of May, 1959, is that correct? A. That's right.

Q. You testified you moved out of that place— A. That's correct.

866

Q. —in May, 1959? A. That's correct.

Q. Now, do you remember the early part of the month of January, 1960? A. The early part, do I remember it?

Q. Of January, 1960? A. I may—well, I may remember it.

Q. Do you recall it? I am asking you if you do? A. In regard to specific things that happened?

Q. Do you remember that month with regard to your transactions with the defendant? A. Yes, I remember it.

Q. Where were you in business at that time? 867
A. 250 West 49th.

Q. Did you have under lease any portion of premises, also, 37 West 20th Street? A. Er, yes.

Q. What part of the building? A. 908.

Q. That was a room on the ninth floor, is that correct? A. That's correct.

Q. And until when did you occupy Room 908 of 37 West 20th in the month of January, 1960? Until what day? A. All right, now. Just a minute. I think by January I think I had already broken the lease there.

868 *People's Witness, Norman Levenberg, Cross*

Q. Well, then you didn't have a place there? A. I had a place previous to that. By January the lease was already broken.

Q. How long before January, 1960, did you leave 37 West 20th? A. You mean did I break the lease in Room 908?

Q. Not break the lease. How long before January, 1960, did you move out of 37 West 20th? A. Well, you just said May. I moved out in May of '59.

869 Justice Galloway: He is referring to Room 908.

Mr. Stein: He is not referring to—

Justice Galloway: Well, aren't you referring to that?

Mr. Kern: 908.

The Witness: I don't know what he is talking about there even. You're only talking about Room 908?

Q. That's the only place I mentioned. A. Okay. What is the question now, please?

Q. How long before January, 1960, did you
870 leave Room 908 of 37 West 20th? A. I would say about November, sometime in November.

Q. And when you left that address you had no other portion of this building under lease orally or written, is that correct? A. I had no other portion of the building under lease?

Q. Yes? A. What was the other part?

Q. Orally or written? A. Orally or written?

Justice Gassman: Other than an oral or a written lease?

The Witness: No, I didn't have an oral or written lease.

Q. Now, did you have access to any part of that building in January of 1960? A. Yes, I did.

Q. What part of the building? A. The basement. The boiler room.

Q. Did you rent that basement? A. No, I did not.

Q. Did the owner of the building know you occupied the basement? A. No, he did not.

Q. Did the superintendent of the building know you were occupying the basement? A. Yes, he did. 872

Q. And isn't it a fact that the superintendent of the building came to you one day early in January and told you that the police were around? Isn't that a fact? A. One day early in January?

Q. Yes? Or in December? A. Oh, he—oh, not—not only did the super tell me the police were around, but the whole building told me that the police were around, from the super up.

Q. That's correct. A. Okay.

Q. Now, that is one reason why you moved merchandise from upstairs in the building downstairs into the basement, is that correct? A. 873 I testified before, Counsellor,—

Q. No. I am asking you now. Is that why you moved from upstairs in the building down to the basement? A. I moved that stuff because the police were watching the room, correct.

Q. And you moved from where down to the basement? A. From Room 908.

Q. So that in January of 1960 you were still in Room 908, were you? A. No, I was not.

Q. When did you move the merchandise— A. I said November.

Q. When did you move the merchandise from 908 down into the basement? A. I already told you, November.

Q. I am asking you now, sir. A. November.

Q. In November. Mr. Levenberg, you have been in business for about how many years? A. Five, six years.

Q. Not longer than that? A. Six years. 1954 I went into business.

Q. From the first time you went into busi-
875 ness, whether with a partner or yourself— A. 1954.

Q. —did you maintain a set of books? A. Yes, we had a set of books.

Q. You kept complete records? A. Yes, we did.

Q. And you certainly kept complete records for your income tax accountant, isn't that correct? A. Sure we did.

Q. Now, you kept all orders, all requisitions, isn't that right? A. That's right.

Q. Kept records—

876 Mr. Stein: Objection, unless he specifies a time.

Mr. Kern: During the whole time.

Mr. Stein: Four-year period?

Mr. Kern: Yes. The five-year period.

The Witness: Just a minute now.

Mr. Kern: This is on credibility.

The Witness: I am glad you brought that up, Mr. Kern, because I did keep records, but I did not keep records of any of Mr. Mishkin's work.

Q. Oh, I see. He is the only customer—or the man, the only one with whom you did busi-

ness where you did not retain the records, is that correct? A. That is correct exactly.

Q. But you did keep these exhibits, these pictures, isn't that right? A. That's right. Oh, yes.

Q. And you did keep certain slips— A. That's right.

Q. —the slips which were received in evidence? A. They turned up in my house.

Q. Yes. They happened to turn up— A. That's right. 878

Q. —just before one day during the month of December, 1959, when you went to Mr. Mishkin, am I correct or incorrect, and you said, "For so much money I'll take you off the hook"? A. That's a lousy lie!

Q. All right. A. That's a lie!

Q. Do you know Mr. Adler? A. If I were—

Q. Do you know a man by the name of Adler? A. Yes, I know a man by the name of Mr. Adler.

Q. Do you know a man who you have known by the name of "Roundee"? (phonetic) A. No, I don't know him.

Q. Never heard of "Roundee", is that right? 879 A. Never heard of him.

Q. Look at that man in back there.—Will you stand up, sir?—Do you know that man? A. I definitely know that man. He worked for Mr. Mishkin in one of Mr. Mishkin's Stores.

Mr. Kern: Sit down.

Justice Gassman: Wait a minute. Let's get the man's name.

Mr. Kern: What is your name?

Justice Gassman: Come up here.

Mr. Goldman: Harry Goldman.

Court Officer: What is your address?

Mr. Goldman: 161 West 36th Street.

Mr. Stein: May we have the witness' last response read back as to whether he knows this man?

The Witness: Oh, yes, I know this man.

Mr. Kern: I move to strike it from the record as not responsive.

Mr. Stein: Objection. I asked that the last question—

Justice Breslin: I didn't hear the answer. Let's hear the answer.

Justice Galloway: Let's hear the question and answer.

Mr. Kern: All right. "Do you know a man by the name of 'Roundee'?" I pointed to him.

The Witness: I said I do not know Roundee, but I know that man.

Mr. Kern: All right.

Justice Galloway: Let's finish it. Let's finish the answer that he gave.

Justice Breslin: Yes. Stenographer, read the answer.

Court Reporter: Answer: "I definitely know that man. He worked for Mr. Mishkin in one of Mr. Mishkin's stores."

Q. You do—You do know Mr. Adler, don't you? A. Yes, I know Mr. Adler.

Q. How long do you know Mr. Adler? A. Very slightly. I met him twice.

Q. Twice before the month of December, 1959, is that correct? A. Yes, that's right.

Q. How many times during the last two weeks were you at the district attorney's office? A. The last two weeks?

Q. Yes? A. The last two weeks. Let's see. I think I was up there Saturday—this previous Saturday.

Mr. Stein: Can we fix a specific time?

A. Not since the trial started.

Mr. Stein: You mean two weeks from today?

Mr. Kern: Just within the last two or three weeks.

884

A. I was up there Saturday. I don't know. Maybe I may have been up there more.

Q. Saturday? A. I was up there Saturday.

Q. What other day? Friday? Thursday of last week? Wednesday? Or don't you remember? A. I know I was up there Saturday.

Q. You don't remember any other days?

Justice Breslin: How many Saturdays did you go up?

The Witness: I know I was up there about a month ago. I was up there a couple of times.

Justice Breslin: On a Saturday?

885

The Witness: I was up there on a Saturday. Was it a Saturday or a Sunday? I think I was there on a Sunday.

Q. Were you there Friday— A. And I was there—

Q. —of last week? A. Friday of last week?

Q. Yes? Or don't you remember? A. I don't remember, no.

Q. Your memory is— A. I have been up there quite a few times. It is not charged in my memory any more, I have been up so many times.

Q. Your memory, sir, is not so good, is it? A. My memory is not too bad.

Q. Not too good? A. It is as good as an average.

Q. But you know, do you, Mr. Levenberg, you sat in the district attorney's office with Mr. Stein, isn't that correct? A. That's right.

Q. And you pointed to every book, and you told him how many copies you printed, the dates when you printed each one— A. That's right.

Q. —of those books, is that correct? A. That is correct. That is correct.

887 Q. And where you made deliveries? A. That is correct.

Q. Without a single memorandum in your possession, is that correct? A. Er, when I did this, it wasn't the last two weeks; it was six months ago when I made the list.

Q. All right. Six months ago? A. That's right. My memory—

Q. And that— A. My memory was much better then than it is now about these books.

Q. You mean because the district attorney and the police officers refreshed your recollection? A. No, they didn't refresh my recollection.

888 Mr. Stein: Objection. I would ask Mr.—

A. They didn't refresh my recollection. I didn't refresh it.

Justice Breslin: He has answered it. Overruled.

Q. Mr. Levenberg, didn't someone tell you in the district attorney's office that you had to fix the time of printing of these books sometimes within two years before this date of arrest? A. Absolutely not.

Q. All right. Yet, Mr. Levenberg, without a document, without a paper, without a record, with nothing before you by means of which you could refresh your recollection, your memory was so good that at that time you could tell the district attorney and the police who were investigating this case with him when you printed each book and how many copies of each you made,— A. Well, I will tell you—

Q. —is that correct? No. Did you, or did you not? A. Yes, I did.

890 Q. All right. Now, is it a fact that you have no written documents, no books, no communications, no records, no requisitions or order blanks, is that correct? A. I had a little information.

Q. What is that? A. I had a little information.

Q. I am asking you if you had books or records—if you have now books, records, requisitions, order blanks, accounting books reflecting upon these transactions? Yes or no? A. The only way I could fix dates here, the only help I had in figuring these dates was from one of my platemakers, a man that shot negatives. I 891 had some bills from him.

Q. In other words, Mr. Levenworth— A. Levenworth?

Q. Not Levenworth.—Levenberg, the only way that you had to fix dates was because someone else told you the dates, your platemaker? A. Plus that I remembered doing certain work at certain times.

Q. And you say that your own recollection was very bad? A. My own recollection is average. I don't say it is bad. I don't say it is good. It is average.

892 *People's Witness, Norman Levenberg, Cross*

Q. Average. All right. Now, tell me, during the—about two years ago, did you sell any books to Liberty Book Shop? A. Two years ago?

Q. Within the last three or four years? A. Yes. One sale.

Q. All right. A. One sale to Liberty Book Store. And one sale to Main Stem Books, too.

Q. To who?

Justice Breslin: Main Stem Books.

Q. One sale? A. One sale.

893 Q. Did you sell to C&G Book Shop? A. Absolutely not.

Q. Did you do any printing work for Kingsley Books? A. Before I answer to Kingsley Books—

Q. I am asking you, sir, did you do any printing for Kingsley Books? A. Just a minute.—Mr. Stein, it may be an individual called Kingsley Books. I don't know him by that name.

Mr. Stein: Your Honor, as it happens, the owner of Kingsley Books also is the head of approximately five other corporations, I believe,—

894 The Witness: Yes. If you tell me who it is, maybe I can help him.

Justice Breslin: Wait a minute. Don't make statements.

Mr. Kern: I will straighten this out, Your Honor.

Q. Did you ever hear of Kingsley Books? A. It doesn't strike a chord.

Q. Never heard the name Kingsley Books? A. I said it doesn't strike a chord.

Q. Did you ever hear the name Kingsley Books, whether it strikes a chord or not? Did

you ever hear the name? A. I don't remember ever hearing the name Kingsley Books.

Q. All right. Were you ever in the Kingsley Book Shop at 220 West 42nd Street? A. 220 West 42nd Street?

Q. Yes. A. Kingsley Book Shop, 220 West 42nd. Is there a book—I don't even know if there's a book shop there. No, I don't think so.

Q. Did you ever visit the Kingsley Book Shop at that address—a shop called Kingsley Book Shop at that address or any other address? A. 896
Wait a minute. Is it also located with a little jewelry store in the same premises, would you know?

Q. No, no, that's not so. A. Then that's not—then I never visited it.

Q. I see. Now, who else did you do work for during the last two years? A. Besides Mr. Mishkin?

Q. Yes? A. Wait a minute.

Mr. Stein: Objection. In reference to what?

The Witness: Yes? 897

Q. In relation to anything. A. What do you mean? Just books for some other people?

Q. In your printing shop, in Norman Offset Company, who did you do business with? A. I did a lot of business with Dora May Company.

Q. What? A. Dora May.

Q. Dora May Company? A. That's right.

Q. Where is Dora May Company located? A. 212 Fifth Avenue.

Q. Anyone else? A. I did work for several printers. I did trade work.

Q. What are their names, sir? A. Lorrell (phonetic) Printing.

Q. Lorrell Printing? A. Correct.

Q. Yes? A. Lorrell Printing. I did work for Phoenix Stationers.

Q. Yes? A. I did work—you said in the last couple of years now, is that right?

Q. That's right. A. I did some work for Debonee (phonetic) Press.

Q. Who? A. Debonee Press.

899 Q. Debonee Press. Yes? A. S. F. Distributors.

Q. Anyone else? A. Harbor Cards.

Q. Anybody else? A. There might have been others. I don't remember all of them.

Q. Your recollection isn't good, is it? A. It is all right. But do you want me to go around—

Q. You don't remember—you don't remember any more than five accounts during the last two years in addition to this account, the defendant? A. Mr. Mishkin kept me pretty busy. I didn't have time for much else.

900 Justice Breslin: What did that represent, the work you were doing for Mishkin?

The Witness: Three-quarters of my business.

Justice Breslin: Seventy-five per cent of your business?

The Witness: That's right.

Q. And you kept no records of that great volume of business? A. How could I keep records? Mr. Mishkin wouldn't let me give him a bill.

Q. I asked you if you kept records. Did you? A. I did not keep records.

Q. All right. A. I tried, but it was impossible.

Q. Now, do you remember the day when the police entered the premises of 37 West 20th and removed the books with reference to which you testified? A. Yes.

Q. Do you remember the day when the police, during the month of December—on December 29, 1959—removed books from Publishers' Outlet at 254 West 42nd Street? A. December 29th, they removed books from th. Publishers' Outlet?

Q. Yes? A. When they removed the books 902
from Publishers' Outlet, I don't know if I was there or not, so I wouldn't remember.

Q. Do you remember the day when the police removed books from the Midget Book Shop at 254 West 42nd Street? A. No, I don't remember that day. I wasn't there. I don't think I was there.

Q. But were you at the premises on West 20th Street when the police removed a lot of books from the basement? A. Oh, yes, I was, sir.

Q. Now, these premises were locked, were they? A. No, they weren't locked, sir. 903

Q. What is that? A. They weren't locked, sir.

Q. Were you there when the police arrived? A. I was there when the police arrived.

Q. That was an open cellar? A. It was an open—

Q. An open basement? A. Er—

Q. Anybody can walk in and out, is that correct? A. I don't know if anybody could walk in and out.

Mr. Stein: Objection. The premises—

The Witness: Let me answer the question.

Mr. Stein: The building—

Mr. Kern: I am talking about the basement.

The Witness: I can answer the question. I think in order to get down to the basement you have to have a key to put in the elevator in order to go down the basement, so that automatically eliminates people from going down the basement.

Justice Gassman: Where were you at the time
905 the police got to the basement?

The Witness: When the police got to the basement I was on the 6th floor in York Bindery. I believe that was where I was.

Q. Did you know the police were due to arrive? A. Yes, I did.

Q. Did the police tell you that? A. Did the police? Yes, the police told me they were coming down.

Q. When did they tell you that, the same day or the day before? A. The same day I had talked to—Yes, the same day I talked to the
906 police they told me they were coming down.

Q. What I mean, was this a telephone call, or were you notified personally by a policeman? A. No, I talked to the police in my lawyer's, Mr. Field's, office; and it was there that we decided to give the police the warehouse.

Q. Now, when was that? What day? A. Oh, it was a day, I can't—

Q. How long before the 12th day of January, 1960, if you remember? A. It seems—that seems like just about the time that they would have picked up the books, January 12th.

Q. Your memory isn't good about that, is that right? A. I don't know exactly.

Q. Was it a month before, a week before, two weeks before? Do you remember that? A. I would say it was around—I would say they picked up the books in the basement around the second or third week in January, I would say.

Q. Mr. Levenberg, I didn't ask you when they were picked up. I know when they picked up the books. I am asking you—

Mr. Stein: Objection. The witness is evidently trying to recall.

908

Q. Well, let me ask you, Mr. Witness— A. Go ahead.

Q. —so there will be no misunderstanding: How long before the day when they picked up the books did you have this conference with the police? A. Same day, sir. Same day.

Q. In your lawyer's office? A. That's right.

Q. What time of the day?

Justice Breslin: What does that refer to, conference in the lawyer's office—

Mr. Kern: Yes, conference.

Justice Breslin: —or the taking of books?

909

Mr. Kern: Yes, when he was told they were taking the books:

Q. What time? A. Twelve o'clock, one o'clock.

Q. At noon? A. Around then.

Q. And what time did the police arrive? A. In the afternoon.

Q. About what time? A. Two o'clock.

Q. Did you go there with the police? A. I did not.

Q. But you knew they would be there? A. I knew they were coming.

Q. You were not there before they got there? A. I went there. That is correct.

Q. Did you go down in the basement? A. No, I didn't go down in the basement.

Q. Did you give the police the key? A. I didn't give the police the key.

Q. Is there a way of walking down from the main floor without having to take the elevator? A. Not that I know of.

Q. You were notified later on, about one o'clock, that the police were downstairs, is that cor-
911 rect? A. I knew they were coming, and I was notified when they arrived.

Q. And you went downstairs to meet them? A. Then I went downstairs to meet them.

Q. Now, you didn't talk to Mr. Mishkin that morning, did you? A. I couldn't see—

Q. No. I asked you if you talked to him. A. Oh, I am sorry. I didn't talk to Mr. Mishkin.

Q. All right. How long before the morning of this day, January 12, 1960, did you make this appointment with the police at your lawyer's office? A. My lawyer made the appointments.
912 I don't know.

Q. How long before? Do you know that? A. My lawyer had talked to the police quite a few times.

Q. And you knew your lawyer was talking to the police? A. Oh, definitely. Of course.

Q. About your surrendering these books, is that correct? A. We weren't discussing surrendering the books until, I think it was just that date that we decided to surrender the books.

Q. Well, were they discussing placing you under arrest for possession of these books? A. No. The police were talking to my lawyer, asking my lawyer to have me cooperate with them.

Q. And they said to you that if you did not cooperate you would be arrested and prosecuted for printing and publishing these books, isn't that so? A. The police never threatened me. It is a funny thing; they never threatened me.

Q. I didn't ask you that. Didn't any police officer tell you or your lawyer, to your knowledge and your information, that if you did not cooperate—which is the word you, yourself, used— A. Right.

Q. —if you did not cooperate, you would be 914
arrested and prosecuted for violating the law with reference to these books? Isn't that so? A. That's the amazing thing, because the answer is "No."

Justice Galloway: Didn't they say that to you?

Justice Breslin: No.

The Witness: No. The answer is "No." No. That's all.

Justice Galloway: That's a simple question.

Q. Now, how long before January 12, 1960, 915
did you talk to this defendant about the books down in the basement? A. The books were not in the basement. The books were—most of the books were moved out to Brooklyn. That's when I talked to the defendant, right after he picked up the books from the place in Brooklyn, where I got three-quarters of the books.

Q. All right. Were there books in the basement on January 12, 1960? A. Yes, there was some left there.

Q. All right. A. Some books were left.

Q. How many were left? A. Maybe, I would say less than twenty-five per cent of what there was there originally.

Q. All right. Now, how long before that day, January 12, 1960, did you talk to Mr. Mishkin about the books which were in the basement? A. Er, I turned over key—see, let me explain this to you now—

Q. No. I am just asking how long before that day did you talk to Mr. Mishkin? A. We didn't talk about books that were in the basement. We
917 had talked about the books I had got out to Brooklyn.

Q. All right. Then you didn't talk to Mr. Mishkin about the books in the basement at any time before January 12, 1960? A. Well, I may have mentioned to him I still have some left in the basement.

Q. Did you tell him that the cops were coming around, were snooping around? A. Oh, definitely. I told Mr. Mishkin everything.

Q. When did you tell him that? A. When?

Q. Yes? A. Well, I told—it was a few times
918 I told it to him.

Q. Well, now, if you remember, about when, before January 12, 1960? A. It was a week before New Year's I remember.

Q. All right. Now, I asked you before how long before did you talk to him about those books in the basement, so now it is about a week before New Year's, is that correct? A. The last time I saw Mr. Mishkin was—was Monday after New Year's. That was the last time I talked to Mr. Mishkin, so I may have mentioned to him that some of the books were still in the basement then.

Q. You may have remembered, is that right? A. I may have told him. I think I probably did.

Q. Well, you don't remember whether you did or did not, is that correct? A. I did tell him.

Q. Oh, now, you are positive you did? A. Yes, I'm pretty sure I told him.

Q. Are you positive, or are you just guessing? A. I am sure I told him the books—some books were still in the basement.

Q. Now, you are sure, is that correct? A. Now 920
I am sure, that's right, Counsel.

Q. Can you just tell the Court what makes you sure now? A. What makes me sure now?

Q. Yes? A. Because I'm starting to remember conversation with Mr. Mishkin—

Q. All right. A. —and the more I remember, that makes me sure.

Q. Now, what time—the Monday after New Year's. And where did you see the defendant? A. In a bar, eleven o'clock in the morning.

Q. You are sure that was a Monday now? A. That's—Monday—let me see.

Q. Just after New Year's? Now, that's what 921
you said before, Mr. Witness. A. Now, wait a minute.

Mr. Stein: Objection. The witness is trying to answer. Mr. Kern is putting one question after another.

Mr. Kern: All right. Let him answer.

Justice Breslin: Let him answer.

A. Can I say this? Can I say I am ninety per cent sure that it was Monday after New Year's, eleven o'clock, in Dino's Bar?

Q. You could be wrong, is that right? A. That's a slight possibility.

Justice Galloway: Where is Dino's Bar located?

The Witness: It is located right next to Publisher's Outlet, right alongside of it.

Justice Breslin: Is there any doubt in your mind that you did meet him there?

The Witness: Oh, no. I met him there.

Justice Breslin: In the bar?

The Witness: I met him there, but I think it was the Monday after New Year's.

923 Justice Breslin: You are uncertain? You are not positive as to the day, is that it?

The Witness: Your Honor, I'm ninety-nine per cent sure, but I don't want to swear to it. I am under oath. I can't swear to it.

Justice Breslin: You know it was Dino's Bar. Where is the bar located?

The Witness: Right alongside of Publishers' Outlet.

Justice Galloway: And it was eleven o'clock in the morning? You are pretty sure of that?

The Witness: I am positive. I will never forget that date, because it was the last time I saw

924 Mr. Mishkin.

Justice Galloway: All right.

Q. Then there is no reservation in your mind? You are positive it was Monday after New Year's?

Mr. Stein: Objection.

A. I don't know if it was Monday.

Mr. Stein: Objection.

Justice Breslin: Wait a minute. He has answered.

Mr. Kern: This is on credibility.

Justice Gassman: He said he wasn't sure it was Monday.

Mr. Kern: And he still says he doesn't know.

Mr. Stein: Mr. Kern is saying now, "You are positive it was eleven o'clock on Monday?"

Mr. Kern: He says he can never forget that day.

The Witness: I know it was eleven o'clock in the morning. I am almost positive it was Monday after New Year's. 926

Mr. Kern: All right.

The Witness: If it was Tuesday, I am sorry.

Q. Mr. Levenberg, then to be perfectly frank, you don't remember all these details, whether it was a Monday or a Tuesday, or eleven o'clock or two o'clock? You don't remember that? It was so long ago, isn't that so? Ten months ago? A. You are telling me I don't remember. I am telling you I remember; you tell me I don't remember. 927

Q. You do remember it, is that correct? A. I told you I do remember it.

Q. But there is no doubt in your mind, is that right? A. That's right.

Q. All right. Now, did you talk to him about the books in the basement? A. I told Mr. Mishkin that I had still some books left in the basement which I could not—which I did not—was not able to get out.

Q. You told him you weren't able to get them out? A. That's correct.

928 *People's Witness, Norman Levenberg, Cross*

Q. Was that because they were locked up there by the police? A. No, sir.

Q. You could have moved them out any time you wanted to, right? A. Definitely.

Q. Yes. Then there was a reason—yes or no —why you told him that you couldn't move them out? A. Definitely.

Q. Now, you weren't shaking him down, were you? A. Definitely not.

Q. You didn't show him these three slips which were received in evidence, did you? A.
929 Definitely not.

Q. You didn't tell Roundee and Mr. Adler that you were going to say what the District Attorney and the cops wanted you to say unless— A. They are a couple of liars.

Q. Just a minute now. A. Couple of liars.

Q. Let me finish. —unless Mr. Mishkin came through handsomely? A. If I wanted to blackmail him, I wouldn't be here now. Neither would he.

Q. Did you— A. I haven't got an ounce of a blackmailer in me.

930 Justice Breslin: Sit down. Sit down.

Q. Did you, or did you not, tell Mr. Adler or Mr. Roundee that?

Justice Galloway: Wait, wait, Mr. Kern.

Mr. Kern: Yes.

Justice Galloway: Get the record straight. He doesn't know—

Justice Breslin: Nobody is making a blackmailer out of you.

Mr. Kern: Yes. He just said—

Justice Galloway: He said he doesn't know anybody by the name of Roundee. He knows this witness back there.

Mr. Kern: Yes.

Justice Galloway: Don't use the name Roundee. He says he doesn't know the man.

Mr. Kern: What's the name—Goldman?

The Witness: Is he allowed to say I am a blackmailer?

Justice Galloway: Keep quiet. 932

He says his name is Goldman.

Mr. Kern: Mr. Goldman. I forgot.

Justice Galloway: Use the word "Goldman."

Mr. Kern: I have forgotten it. I am sorry.

Justice Galloway: All right.

Q. Now, did you make any statement like that to Mr. Goldman? A. No.

Q. All right. Or to Mr. Adler? A. No. Should I tell you what they told me? Would you like to hear? 933

Q. Just a minute. Did you tell Mr. Mishkin to remove the books from the basement? A. I did not tell Mr. Mishkin to remove the books from the basement.

Q. Did you tell Mr. Mishkin that you had set up an appointment with the police? A. I may have told him. I probably did. I was confiding in him. I told him what was happening.

Q. You may have told him, you say? A. I was confiding in him.

Q. You don't remember, is that correct, whether you told him or not? A. I can't remember that exactly.

Q. All right. That was at the beginning of January, 1960? That's correct, isn't it? A. That's right.

Q. All right. Now, when the police went to premises 37 West 20th Street, you say you went downstairs and you met them in the basement? A. That's right, sir.

Q. You saw them pack these books and prepare to take them out? A. That's right.

Q. Now, at that time you had no lease to any
935 portion of 37 West 20th Street, is that correct? A. That's correct.

Q. The superintendent knew that you had those books down there? A. That's correct.

Q. He knew that you were storing merchandise in there, isn't that correct? A. That's correct.

Q. As a matter of fact, during all the time that you were at 37 West 20th Street you used the basement as a storeroom, isn't that correct? A. All the time?

Q. Well, I don't mean every minute of the day. Whenever you had something to store
936 down there, you would bring it down into the basement? A. Oh, no, no, no, no, sir. What are you—

Q. When— A. No. I used Room 908 when I was in 37 West 20th.

Q. Was 908 used as a storeroom? A. 908 was a storeroom.

Q. Did you use any other portion of the building as a storeroom? A. No. Just 908.

Q. You had enough room in Room 908? A. Oh, it was a big room. As big—almost as big as the courtroom.

Q. Yes? A. Not quite.

Justice Breslin: Where was your plant in the building? What floor?

The Witness: You would have to tell me what period. Before May or after May?

Justice Breslin: After May.

The Witness: After May, I was at 250 West 49th, your Honor.

Justice Breslin: Well, before May, where were you?

The Witness: Before May, I was in that building.

938

Justice Breslin: What floor were you on in that building?

The Witness: I was on the 12th—well, I moved from the 12th down to the 10th floor.

Justice Breslin: And you had this room in 908?

The Witness: I had the room on the 9th floor, yes.

Justice Breslin: You said that room is as big as this courtroom?

The Witness: No, not as big. I am sorry. I would say it is about as big—about as three-quarters the size of this room.

939

Justice Breslin: Three-quarters. Now, you just testified that at one point, I believe you said, in 1959, you moved the—whatever books were in 908 down to the basement, is that correct?

The Witness: That's correct.

Justice Breslin: And what month was that, sir?

The Witness: Well, I think that was in November.

Justice Breslin: November of '59?

The Witness: '59.

Justice Breslin: '59. And you mentioned here before something about moving books either to Brooklyn or from Brooklyn, sir?

The Witness: That's right, your Honor.

Justice Breslin: Well, what did you do, take them to Brooklyn or from Brooklyn to the basement?

The Witness: I took the books—I took the books which were in the—the building was under surveillance—

Justice Breslin: Yes?

941 The Witness: —37 West 20th, and the books were in the basement.

Justice Breslin: Yes?

The Witness: And I took the books from the basement, and I got them out to a store. I rented a store on McDonald Avenue in Brooklyn.

Justice Breslin: Yes. You brought them out there?

The Witness: I got out about three-quarters of the books there.

Justice Breslin: I see.

The Witness: Then I gave Mr. Mishkin the

942 key to that store.

Justice Breslin: And you still left some books in the basement of the premises?

The Witness: The only reason those books were left there, your Honor, is because it was costing a lot of money to get the books out. We had to work. It was very tough, you can imagine, with the police watching the whole building. It was very tough to get the books out. We had to remove them a carton or two cartons at a time. I ran out of money, and I couldn't get the rest of the books out.

Justice Breslin: One of the previous witnesses here yesterday testified that the basement room—testified to the dimensions of it and that access to it was gained through a metal door that was about thirty inches by thirty inches.

The Witness: Yes, it was very hard to get them in there. I understand it was very hard getting them in there. Your Honor—

Justice Breslin: Getting what?

The Witness: Getting the books in and out, I understand it was very hard. 944

Justice Breslin: Is that the only means of access to the basement room?

The Witness: Yes, sir. It was boiler room. It was a boiler room, and I think that was the only way of getting it in, just that one little hole in the wall to get in.

Justice Gassman: You mentioned something before about a key to the elevator that took you down to the basement.

The Witness: Well, the only ones that had the key to the elevator was the people that worked in the building, the porter—

Justice Breslin: Was that door on the boiler room kept locked, sir? Do you know? 945

The Witness: The door on the boiler? I don't think it was locked. I am not positive. I don't—

Justice Breslin: What else was in that room—withdrawn. Did you ever go into that room?

The Witness: I was in that room, yes, your Honor.

Justice Breslin: What else was in the room besides these books which you say you brought down from 908?

The Witness: Nothing else. Just the books.

Justice Breslin: You said it was a boiler room?

The Witness: It is a boiler room. Well, the building fixtures, boiler, and all that stuff, but there was nothing else stored in there. The only thing down there was books.

Justice Galloway: Was this the plant that would heat the building, this room?

The Witness: Yes.

Justice Galloway: Or was there another heating plant? Or do you know?

The Witness: I don't know.

947 Justice Galloway: If you don't know, say, "I don't know."

The Witness: I am not even positive.

Justice Galloway: This was in the middle of winter almost, wasn't it?

The Witness: Yes.

Justice Galloway: Well, wasn't there heating plant? Wouldn't that dry out the books or papers, or rot them?

The Witness: It was pretty hot in there; that's all I know, your Honor.

Justice Breslin: How were these books kept, in cartons or—

948 The Witness: Cartons.

Justice Breslin: Cartons.

Q. Did you have a lease to this store out there in the Bath Beach or Bensonhurst section of Brooklyn? A. I didn't have. I didn't have a lease. I just rented. I just gave a month's rent.

Q. You made the arrangements with the landlord— A. That's right.

Q. —to rent the place, isn't that correct? A. Correct.

Q. Now, the books you moved from 908 went down to the basement, isn't that correct? A. That's correct.

Q. You moved those books in there yourself, isn't that right? A. I personally didn't move them down, but—

Q. Some friends of yours helped? A. That's right. They moved it down there.

Q. There was no trouble getting the books in that room, was there? A. There was no trouble getting the books in that room? 950

Mr. Stein: Objection. The witness testified he didn't move the books.

The Witness: Wait a minute, now. He is asking me about something. I wasn't there, but I understand there was plenty trouble and there was plenty involved getting the books in the basement.

Q. Your friends told you that there was plenty of trouble? A. I think there was, because there was cops around watching that room. It must have been involved.

Q. They were watching the room? A. It must 951 have been involved.

Q. Could anyone watch the room down in the basement from outside the building? A. Watch— Pardon me. Let me get that question.

Q. The room—who was watching the room? A. Room 908?

Q. Not 908. Downstairs in the basement? A. Nobody.

Q. Nobody? A. As far as I know, nobody was watching the room in the basement.

Q. And 908 is on the ninth floor? There is a public hallway or corridor, isn't that correct? A. That's correct.

Q. And someone was in the corridor there, police officers, watching that room? A. Oh, I don't —I don't imagine police would stand like—be so obvious, but I imagine they were watching it if some policemen—

Q. This was your imagination, isn't that correct? A. No. Mr. Mishkin told me this building was under surveillance. He told me the room was under surveillance. Mr. Mishkin first told me that.

953 Q. Didn't you tell that to him? A. No. He told me. He told me, "Stay away and don't fill any orders."

Q. When was that? A. I couldn't fill the orders. He said, "Don't fill the orders."

Q. When was that? A. When was that?

Q. Yes? A. October.

Q. Of what year? A. Of '59. Mr. Mishkin said, "Don't fill the orders, because they are watching the room." Mr. Mishkin knew it before I did.

Q. And no effort was made to move the books out of the building, at that time, is that correct?

954 A. How would you move it out if the police were watching—

Q. I am asking you. Was any effort made to move the books out? A. Yes, I did make an effort.

Q. Did you then move the books out to Brooklyn? A. No, sir. It could not be done. Do you want to know the story? I will tell you.

Q. You were looking at some sheets yesterday while you were answering questions that the district attorney asked you? A. Yes, sir.

Q. May I see them, please? A. Is it okay, Mr. Stein?

Justice Galloway: Show him the sheets.

Justice Breslin: Yes, show him the sheets. Don't ask Mr. Stein. Ask us.

Q. Are these sheets—Well, there's nothing on one sheet. Are these sheets in your handwriting? A. They are, sir.

Q. Represented on these sheets are the names of these books with reference to which you testified— A. Correct, sir.

Q. —dates, and figures—a thousand, twenty-five hundred—five hundred, and so on and so 956
forth? A. Correct, sir.

Q. When did you write these sheets? A. I wrote it a month ago in Mr. Stein's office. We thought—

Q. No, no. A. —just before we were going to go to trial—

Q. You wrote them a month ago in Mr. Stein's office? A. That's correct.

Q. Who told you to write these sheets? A. It was my own idea.

Q. Did anyone suggest the idea to you? A. No, no one suggested the idea.

Q. Did you write these sheets while Mr. Stein 957
or while any police officer was talking to you about these books? A. Yes. They were asking me to identify the books again.

Q. Yes. They took these books in the order in which they appear on these sheets, is that correct? A. That's correct.

Q. The first one, "Raw Dames"? A. That's correct.

Q. The next one, "This Way Down"? A. That's correct.

Q. Was Mr. Stein questioning you or a policeman? A. Mr. Stein.

Q. And he asked you on what date this book was printed? A. That's right.

Q. And you said what? A. And I said to him, "I did the exact same thing for you six months ago. I had to rack my memory. I don't want to go through it again. Can I copy down—"

Q. Mister, please forgive me, but—

Mr. Stein: Objection.

Q. Oh, this is the answer. I am sorry. A. I am giving you the answer.

Mr. Stein: Objection.

Q. I am sorry. I thought he was commenting. I apologize. Please forgive me. I didn't know that.

Justice Breslin: Complete your answer.

Q. Go right ahead. I didn't want to interrupt you. A. I said to Mr. Stein, "Mr. Stein, I racked my memory for you about six months ago before going to the Grand Jury to make up those sheets. I am sorry, but I lost those sheets. Now, is it possible when you wrote down the information which I gave you—is it possible you can give me back that information which I gave you?" Mr. Stein had the sheets. See, when I gave him the information six months previous he had a sheet there—chart, which he was writing as I told him what to write.

Q. I see. A. I asked him if he still had those sheets. He said, "Yes."

Q. All right, Mr. Levenberg. When did you print "Raw Dames"? A. When did I print "Raw Dames"?

Q. Yes?

Mr. Stein: I will object unless Counsellor shows him the book,—

Justice Breslin: If you can remember.

Mr. Stein: —which I think is not inappropriate.

Mr. Kern: No. That's exactly it. There was only one "Raw Dames".

Justice Breslin: He hasn't testified—The question is, "When did you print—" what?—"'Raw Dames'?" 962

Mr. Kern: "Raw Dames."

Justice Breslin: "Raw Dames". Do you remember, sir?

The Witness: I don't remember offhand without really thinking about it.

Justice Breslin: Can you give us the approximate time?

The Witness: "Raw Dames"? "Raw Dames"? Early part—Early part of '59.

Q. What month? Do you know? A. Early part would be January. January.

Q. Well, you testified before that you printed 963
that book in February, 1959, didn't you? A. That's pretty close. Yes.

Q. Yes. Now, you don't remember except a few— A. Could I explain something right now, Counsellor?

Q. No. When did you print "This Way Down"? A. "This Way Down"?

Q. Yes? A. "This Way Down" I printed that, I would say, in May of '59.

Q. When did you print "The French Girl On The Stairs"? A. "The French Girl On The Stairs," oh, that goes way back. That's—that's about January, '58.

Q. Now, you are testifying from memory, is that correct? A. Well, it is a question. All right, I am giving you the answer to the question.

Q. You remember what you wrote on these sheets of paper, do you? A. No, I don't remember from the paper.

Q. All right. Now, you say you don't remember what you wrote on these papers? A. I'm remembering when I did the job now.

965 Q. Mr. Witness, I am asking you, did you say you don't remember what you wrote on these papers? A. I told you how I come to write the papers.

Q. Did you say you don't remember what you wrote on these papers? Yes or no? It is a very simple question. Do you, or don't you, remember what you wrote on these papers? A. At this moment, I do not know exactly what is written on those papers.

Mr. Kern: All right. Now, may I just interrupt for a moment, or digress for a moment, and ask the Court to direct
966 the district attorney to submit to the Court any previous testimony given by the defendant—this witness, whether in the Magistrates Court, Grand Jury, or any statement transcribed or given by this witness to any representative of the office of the district attorney of New York County.

Mr. Stein: At this time I offer to the Court, pursuant to People against Walsh, the Grand Jury minutes in the case—in this particular case, for the Court to scrutinize as to inconsistencies.

Justice Breslin: That is the only sworn testimony?

Mr. Stein: This is the only sworn testimony or —in transcript.

I also have a sheet here which indicates the pages on which each witness testified.

Mr. Kern: Fine.

Mr. Stein: I also have charts from which Mr. Levenberg gave me information which I would be glad to give the Court.

Mr. Kern: May I go further? Notwithstanding that I know the rule of People against Walsh and the People against Spencer, I respectfully ask the Court—I respectfully move the Court to permit counsel for the defendant to examine the testimony of this witness given before the Grand Jury. 968

Justice Breslin: We will look at it first, Mr. Kern, following rule of—

Mr. Kern: Then the Court reserves decision on this?

Mr. Breslin: Yes.

Mr. Kern: All right. 969

Q. Now, just to leave this for a little while, you —oh, I am sorry.

Mr. Stein: May I just have one word with Mr. Kern? I have other witnesses. I would like to know whether to keep them or not.

(Messrs. Stein and Kern confer off the record.)

Q. Now, what equipment did you have in your printing shop? A. I had a 1722 Webendorf (phonetic), cutter.

970 *People's Witness, Norman Levenberg, Cross*

Q. What else? A. Well, we had—at one time when I was with Mr. Dichter, we had two 1722 Webendorfs.

Q. During the period with reference to which you testified? A. Yes. Most of the time I had two 1722 Webendorfs. I had a plate-making machine and a cutter.

Q. Anything else? A. No. That's all.

Q. Nothing else? A. That's all.

Q. Then you did your own plate making? A. No. Just a minute, sir?

971 Q. Did you? A. You see, there's two phases to plate making. You have to first have a negative shot. After the negatives are shot, then you strip it up on a piece of goldenrod. Then you burn it in on a plate. Now, I didn't have the camera, so I had to give the camera a work out; and when I got back the negatives, I would strip them up on a piece of goldenrod and burn my plates for the press.

Q. I see. Mr. Levenberg, you had almost all of the equipment, or practically all of the equipment, necessary to turn out a book—a complete

972 book, isn't that so? A. I had most of the equipment, correct.

Q. In other words, from the moment you were handed a manuscript— A. Oh, I am sorry, sir. A complete book also includes the binding. I had no bindery equipment.

Q. Well, you would send it to a binder, isn't that so? A. We would send it to a binder, that's right.

Q. Now, did you print any books for your own account ever? A. For my own account?

Q. Yes? A. I know the answer is absolutely not, but I am just thinking, because—

Q. Why are you thinking? A. —because I like to be doubly sure. I like to take a little time, if you don't mind Counsellor.

Q. Go right ahead. A. Print any books for any other company other than Mr. Mishkin?

Q. No. Did you ever print books for your own account, books that you, yourself disposed of? A. Books that I disposed of? No. No, I never did.

Q. You are sure you never did? A. I never did. 974

Q. You are positive of that? A. Positive.

Q. Now, may I see Exhibits 69, 70, and 71? Now Mr. Witness look at People's Exhibit 69. Did you print that? Is that your job? A. I—I—I did this book. The first time I did this book I know that it was a much better job than this cover here.

Q. Is that your job? A. Now—I don't think this is my job.

Q. All right. Now, that's an honest statement.

Mr. Stein: I will ask that that be stricken. 97

Mr. Kern: Well, I withdraw it.

Q. Look at People's Exhibit 70 and tell us if that's your job? A. That is a lousy-looking—I do better work than this, I think.

Q. It is not yours, is it? A. I don't know. I think—see—let me explain something to you. Mr. Mishkin occasionally gave me reruns on this book. Now, on a rerun, if I happened to misplace the original cover negative on it, then I would have to shoot from what I had already printed; and it wouldn't be a good job. It is

possible that I did print it, but I will say it definitely is not the quality that the first printing was.

Q. Is that your job? You told us 69 was not your job. Is that your job? A. I know I did a better job than that.

Q. Then you say it is not your job? A. It is a lousy-looking job. I would do a better job than that.

Q. You say that is not your job? A. I don't
977 think it is my job.

Q. Look at People's Exhibit 71. That's not your job, is it? A. I printed this book for Mister —I printed "Stud Broad" for Mr. Mishkin,—

Q. Is that your job? A. —but this particular book I don't think I printed.

Q. Now, Mr. Witness, why did you tell the Court in answer to questions asked by Mr. Stein that you printed these books, People's Exhibits 69, 70, and 71? A. I printed "Stud Broad".

Q. You were asked if you printed these books, when you printed them, and how many you printed. A. And I gave him the correct answer.

978 Q. You answered, "Yes." A. I gave him the correct answer. I said I printed "Stud Broad".

Q. Mr. Witness, Mr. Stein handed you this book and asked you when you printed that book, and you gave the date; and he asked you how many, and you gave the number, is that correct? A. And I gave the correct answer.

Q. Then you did print that book is that right? A. If somebody else wants a copy of the book I do. I can't help myself.

Q. You just don't want to understand my question, do you? A. I do understand your question. I did print "Stud Broad".

979

Justice Gassman: You testified before, in answer to Mr. Stein's question, when he showed you Exhibit 60—that is the book called "Woman Impelled"—you testified that you printed it in October, 1958, and that you printed a thousand copies. Now, did you print a thousand copies of that book in October, '58, or didn't you?

The Witness: I definitely did, Your Honor.

Justice Gassman: Well, you just answered—

The Witness: He is pointing—

Justice Gassman: —that it is not your job.

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The Witness: You don't understand what—Your Honor, he is pointing to these books and saying did I print these particular books. What I think he is getting at is maybe somebody else copied them. It looks it to me. See, somebody else copied these books.

Justice Breslin: In other words, your testimony is, sir, that you did print a thousand copies of that particular book, "Woman Impelled", in October of '58, but you are not certain that that is one of the ones you actually printed?

The Witness: That is exactly right, Your Honor.

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Justice Galloway: And the same applies to 70 and 71, is that correct?

The Witness: The same applies to "Stud Broad" and "Eyewitness".

Justice Breslin: But those three editions which you have in front of you you now say does not look like your work?

The Witness: Does not look like my work.

Justice Breslin: Is there any doubt in your mind, sir, about any of the other numerous exhibits that you picked out? A. Any doubt in your mind that that was your work?

The Witness: I would have to give them a fast once-over.

Justice Breslin: You looked at them before when you testified.

The Witness: When I looked at them before, no, there was no doubt about the others—the other ones. Those three, Your Honor—

Oh, wait a minute. Give me that book.

Court Officer: Which one?

983 The Witness: "I Will Try Anything Twice". The first time—This book here may have been copied. I don't know. It looks—see, the first time I printed this job it was a much nicer job.

Justice Breslin: What is the number of that?

The Witness: I'm not positive I printed that.

Court Officer: Exhibit 23—People's exhibit.

Justice Breslin: All right. There is some doubt in your mind about that one?

The Witness: Some doubt in my mind about this one.

984 Justice Breslin: But you did print this book when you testified you printed it?

The Witness: I don't—Judge I printed that book.

Justice Breslin: And in the amount you testified to?

The Witness: That's correct.

Justice Breslin: All right.

Q. In other words, Mr. Witness, if the district attorney showed you these books and offered them in evidence after you testified, you understood when they were received in evidence that

the Court had been informed that you, yourself, printed these books and that you printed twenty-five hundred or one thousand of each, isn't that correct? A. I was more concerned with the title. I did not print those books. I wasn't concerned with—so much with the book itself.

Q. All right. Now, there are a great many books which were shown to you by the district attorney? A. That's right.

Q. You saw these books in the district attorney's office when you wrote up these sheets, isn't 986
that correct? A. That's right.

Q. And at that time you told the district attorney you printed these books, didn't you? Didn't you tell him that? A. On this book here, "Woman Impelled",—on "Woman Impelled" I think I told Mr. Stein that I did "Woman Impelled", but this looks like somebody else copied it.

Q. Did you also testify in the Grand Jury that you, yourself, printed these books, giving the number of each book and the date when you printed them? A. Yes, I did print these books.

Q. All right. Now, you say you didn't print these books and you don't know who printed 987
them, is that correct? A. I printed the titles. I printed the same books as these.

Q. I am not talking about the same book. We are talking about the book— A. This book right here.

Q. You didn't print it? A. This book right here I didn't print.

Mr. Stein: Objection. I think the Court fully understands—

Justice Breslin: Indicating—?

Mr. Kern: Indicating Exhibit 70.

Justice Breslin: That one you definitely did not print, is that right?

The Witness: I'm pretty sure I didn't print that. I'm pretty sure, also, about these two.

Q. And you say you did not print People's Exhibit 71 and you did not print People's Exhibit 69, is that correct? A. I did not print these books right here.

Q. These three books. All right. Now, if you testified that with reference to whatever the number of books—say, a thousand of "Eyewitness," of twenty-five hundred of "Stud Broad"—you didn't print one of those, notwithstanding—let alone twenty-five hundred or a thousand, isn't that correct? A. I told you I printed those titles. I told you I printed those books.

989

Q. Mr. Witness, the district attorney asked you how many of People's Exhibit 70 you printed. How many did you testify you printed? A. "Eyewitness"?

Q. Yes? A. Twenty—thirty-five hundred.

Q. Did you print thirty-five hundred— A. Yes.

Q. —of this book? This book? A. I printed thirty-five hundred "Eyewitness".

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Mr. Stein: Objection, Your Honor.

Q. Now,—

Mr. Stein: Objection.

Justice Breslin: Overruled.

Mr. Stein: May I state my grounds? How could he possibly print thirty-five hundred of this particular book? This book is only one book evidently. He printed thirty-five hundred of some book.

Mr. Kern: Well, I'll go into that. I think we all know what I mean.

Q. You say you printed thirty-five hundred of these, is that correct? A. Yes, that is correct.

Q. Now, if you didn't print this one then you didn't print thirty-five hundred, isn't that correct? A. I don't understand the man.

Justice Galloway: That's a perfect *non sequitur.*

A. (Continuing) I printed thirty-five hundred "Eyewitness". I didn't print this one. 992

Justice Breslin: I think you made your point. Go on to something else.

Mr. Kern: All right.

Of course, Judge Galloway, when you say it is a *non sequitur* I don't think it is, because here is a book which was received in evidence. Now, I am addressing myself—

Justice Galloway: Mr. Kern, I heard your point. You made your point.

Mr. Kern: Well, then I misunderstood.

Justice Galloway: You made your point.

Mr. Kern: Of course, if it is a *non* 993 *sequitur*—

Justice Galloway: This book was shown to him by the district attorney, and he says, "I printed—

Mr. Kern: Yes.

Justice Galloway: —thirty-five hundred copies of 'Eyewitness'." You show him the book now; and he says, "This isn't my job. This doesn't look like my work."

Mr. Kern: My apologies to Your Honor.

Justice Galloway: But he says, "I did print thirty-five hundred copies of 'Eyewitness'."

The Witness: That's right.
Mr. Kern: I see.

Justice Galloway: That's what he said.

Mr. Kern: Well, now, then, I think it is perfectly in order for counsel to move to strike out all of the testimony with reference to at least these three exhibits.

Mr. Stein: Your Honor, may I be heard on the motion?

Justice Breslin: Yes.

995 Mr. Stein: We are charging the defendant with being the publisher, with hiring others to print and prepare, and with possessing with intent to sell, a book entitled "Eyewitness", a particular book. We have heard testimony that a book by that title was seized in a warehouse. We have heard testimony from a printer who states that he printed copies of that same-titled book, that the defendant ordered him to do so. Now, whether or not this specific book is a book which he printed, I think, is totally irrelevant to the information.

996 Mr. Kern: Well, except when the district attorney—

Justice Galloway: Wait. Just a minute.

Justice Breslin: Go ahead.

Mr. Kern: I am sorry.

Justice Galloway: I would like to make a comment, Mr. District Attorney. Suppose that the book, the "Eyewitness" he printed was entirely different than the book that you are presenting here—

Mr. Stein: Yes, Your Honor.

Mr. Kern: Yes.

Justice Galloway: —suppose it was an entirely different book, suppose part of it was deleted or something was added?

Mr. Stein: I submit this, Your Honor: That if Mr. Kern has this in the back of his mind, we have already established from the witness that he printed the book "Eyewitness"; that is, this book; that if Mr. Kern feels that the book "Eyewitness", which this witness is testifying to as having printed, is some other book, he may 998
ask the witness to look at the book and ask if he can recall something about it. In addition to which striking the witness' testimony I don't think is a proper remedy here, for there will be other witnesses who will shortly testify as to the contents of these books.

Justice Breslin: All right. We will deny your motion at this time. The right is reserved to you—

Mr. Kern: All right.

Justice Breslin: —to move to strike out these four exhibits later on, sir— 999

Mr. Kern: I see.

Justice Breslin: —if they are not properly connected.

All right, suppose we give the stenographer a five-minutes rest.

(Five-minute recess.)

Q. Now, Mr. Levenberg, when you were first taken—no, you weren't taken into custody by the police at any time, were you? A. No, sir.

Q. But when these books were removed from the basement of 37 West 20th Street you know they were taken to the district attorney's office? A. That's right, sir.

Q. Did you go to the district attorney's office
1001 that afternoon?

Mr. Stein: Objection. I think Counsel is indicating that the books were brought to the district attorney's office the same afternoon.

I think you ought to clarify that.

Justice Breslin: All right.

Justice Galloway: Do you know where they took the books that day?

The Witness: No, I don't know where they took the books that day.

Justice Galloway: Tell him that.

1002 The Witness: I don't know where they took the books that day.

Q. In any event, the same day, or the next day, within the next two or three days, you went to the district attorney's office, didn't you? A. That's correct.

Q. Now, when you went to the district attorney's office, at that time—I'm talking about the very first visit—at that time had you already given your lawyer these pictures? A. Pictures?

Q. These sketches?

Justice Gassman: So that there won't be any question about it, you are referring now to the Exhibits—

Mr. Kern: Yes.

Justice Gassman: —4A, 21A, 22A, 23A, 23B, 24A, 25A, 25B, 26A, 28A, 29A, 30A, 34A, 37A, 60A, 70A, 71A, 72A?

Mr. Kern: Yes, Your Honor, that's correct.

Q. Or don't you remember? A. I gave them to him at a much later period, a couple of weeks later. 1004

Justice Gassman: A couple of weeks later?

The Witness: Yes. I think it was a couple of weeks later.

Q. And during that time you had these exhibits referred to by the Court at your home, is that correct? A. That's right.

Q. They were on the wall? A. No, they weren't on the wall.

Q. Just piled up in some room? A. Yes.

Q. Now, you also held for the same time in your possession the three slips of paper which were received in evidence as People's Exhibits— 1005

Justice Gassman: 73A, B, and C.

Q. Do you remember those three slips, 73A, B, and C? A. They were in my possession, but I honestly didn't know they were in my possession.

Q. I didn't ask you that. You held those and you gave them to your lawyer at the same time you gave him these pictures? A. Correct.

Q. Now, before the police seized these books from 73 West 20th Street, had you at any time

made a statement to any police officer or any assistant district attorney about the books? A. No.

Q. Had you been to the district attorney's office, if you remember? A. I don't remember. I don't remember going down to the district attorney's office before giving him the books. I think—I only met with the Inspector Plansker before that.

Q. But you don't remember. You have gone, and you may not have gone, to the district attor-
1007 ney's office? A. I don't remember precisely.

Q. Your memory isn't too good as to what happened ten months ago, is that right? A. That's right.

Q. All right.

Justice Gassman: But you did talk to and have conferences with the police before the books were seized?

The Witness: Oh, yes, sir.

Justice Gassman: Pardon me. Did you give any statement to anybody in the Police Department?

1008 The Witness: Not before we gave them—not before we gave them the books we didn't give any statement to the police.

Justice Gassman: What's that? I am talking about before the books were seized.

The Witness: We talked to them, but we didn't give them any statement.

Justice Gassman: Well, I am talking about you.

The Witness: I consider "we" being my lawyer. I am sorry, Your Honor.

Justice Gassman: You and your lawyer.

Q. When did you first confer with Inspector Plansker? A. He called me at my home. I think it was about a week before, about a week before New Year's.

Q. And did he ask you to come to see him? A. Yes. He called me from my shop at 250 West 49th, and he asked me to come down there.

Q. You went down? A. No, I didn't go down.

Q. Did you make an appointment with him? A. I told him I would either get in touch with him that day or the next day.

1010

Q. And you got in touch with him the next day? A. The next day.

Q. Did you see him the next day? A. No, I don't believe so. I believe—

Q. The day after? A. Soon after that, yes, right around there.

Q. At the district attorney's office? A. No. In my—in Mr. Field's office.

Q. Was the inspector alone? A. He came down with two other policemen.

Q. Was a stenographer with them? A. No.

Q. Anybody taking notes? A. No.

Q. Anyone operating a machine such as you see 1011 the court reporter using directly in front of you? A. No.

Q. And you told them the whole story, did you not? A. No, I didn't tell them the whole story.

Q. Well, did he tell you that you would be prosecuted for printing these books? A. No, he didn't.

Q. Did he tell you that you were violating the law by printing these books? A. He had a conversation with Mr. Field, and in the conversation they were discussing what constitutes pornog-

raphy. Mr. Field showed him a couple of magazines, and they were discussing if it was pornography or not.

Q. Well, did you hear Inspector Plansker say that you could be prosecuted for printing these books? A. Inspector Plansker never said that to me.

Q. Never said anything like that? A. No.

Q. All they discussed was pornography? A. They discussed pornography; and before he left
1013 he turned around to me, and he said, "Norman, I want you to cooperate with us."

Q. And you said you would,— A. I—

Q. —is that correct? A. I didn't say—I didn't tell him at that time I would, no.

Q. When did you tell him you would cooperate? A. A couple of weeks later.

Q. When? About when? A. Well, oh, about the middle of January, I think.

Q. The middle of January? About January 15th? A. Around then, I guess.

Q. That's your best recollection, is that correct? A. I think so.

1014 Justice Galloway: Was it after that conference you had at the bar with Mr. Mishkin?

The Witness: Oh, definitely, it was after the conference at the bar with Mr. Mishkin. That is definite.

Q. About January 15th, you say, you told the police you would cooperate? A. I think it was about that, sir.

Q. And after that, they went down and took the books from West 20th Street? A. After that they went and took the books.

Q. How long after that? A. Well, after I decided to cooperate I told them to pick up the books.

Q. All right. It was about the middle of January you said, about January 15th, that you told Inspector Plansker you were going to cooperate? Now, how long after that day was it when you told him you were going to cooperate did they go down to 37 West 20th Street and did you see them down in the basement removing the books? A. An hour or two later. 1016

Q. On that day? A. On that day.

Q. Well, it was the 12th of January when they seized the books? A. What did I say?—January—?

Q. The 15th. A. I am sorry.

Mr. Stein: He said about the 15th, Your Honor.

Q. Well, that's because you don't remember well, is that right? A. I remember. I don't remember exact dates, Mr. Kern.

Q. Well, all right. You do remember exact numbers how many you printed of each one of 1017
these books a year and two ago? A. Of course, because they were all similar.

Q. Of course. A. Mr. Kern, don't you see the pattern—twenty-five hundred, a thousand?

Q. This is a very simple thing, remembering how much of each book you printed on what date? A. It is either twenty-five hundred or a thousand, Mr. Kern.

Q. And the dates, also—you remember the dates also, don't you? A. I don't remember the date exactly, no, Mr. Kern.

Q. Now, you did testify under oath in this court— A. That's right.

Q. —to the dates when you printed each one of those exhibits, isn't that correct?

Mr. Stein: Objection. The question that I posed to the defendant—the witness on each occasion is, "Approximately when did you print this?"

Justice Breslin: Yes. Sustained.

Mr. Kern: I respectfully except. This
1019 is on the question of credibility, of course.

Q. Well, all right. Now, Mr. Levenberg, you know the exhibits that I refer to when I use the words, "The black and white books published by Nutrix Publishing Company of Newark, New Jesrey"? A. Right.

Q. "Pleasure Parade, Volumes 1, 2, 3, and 4." These were Exhibits, I believe, 54, 53, 52, and 51. You are familiar with those books, aren't you? A. I'm familiar with the black books. I think there were thirteen of them.

Q. Yes. Now, what you did with regard to
1020 those books was to make copies of them, isn't that so? A. That's correct.

Q. These books were, as you know, being sent through the mail all over the country by Nutrix Publishing Company, isn't that correct? A. I don't know how Nutrix distributed, sir.

Q. Well, you know. You have heard of Nutrix Publishing Company? A. I know that Mr. Mishkin has those books in his store. That I know.

Mr. Kern: I move to strike that out, if the Court please.

Justice Breslin: Strike it out.

Q. You heard of Nutrix Publishing Company, haven't you? A. Through these books I heard of them.

Q. You know that they are in business in Jersey City, New Jersey, don't you? A. That's right.

Q. You have seen these books on bookstands and bookshelves and on magazine racks?

Mr. Stein: Objection. This has nothing to do with the defendant's complicity in these books. 1022

Justice Breslin: Overruled.

Q. You have seen them, haven't you? A. Yes, I have seen them.

Q. Now, you took those books and you made reprints of them, is that correct? A. I didn't take them. Mr. Mishkin handed them to me.

Q. All right. He handed them to you. A. That's right.

Q. You didn't inquire of Nutrix Publishing Company whether or not it was all right to reprint these books, did you? A. I am not the publisher; Mr. Mishkin is. 1023

Q. You didn't make any inquiry, did you? A. No. I don't make any inquiries.

Q. Did you print any of those for your own account and sell them yourself? A. Definitely not.

Q. Isn't it a fact, Mr. Levenberg, that all of those books down in that basement which were taken by the police on January 12, 1960, were your own personal property— A. Definitely not.

Q. —kept in your own storeroom down in that building? A. Definitely not.

Q. Definitely not, huh? Did you make your own printings of "Strange Passions",— A. Definitely not.

Q. —and sell them yourself? A. Definitely not.

Q. "Whipping Chorus Girls"? A. Definitely not.

Q. How about "Arduous Figure Training?" A. Definitely not.

Q. "Pleasure Parade"? A. No.

1025 Q. How about "Hollywood Spankers?" A. No.

Q. You did not print— A. No.

Q. —any of those books? A. I printed them for Mr. Mishkin.

Q. None for yourself— A. Absolutely not.

Q. —or for any other distributor? A. Absolutely not.

Q. And you say you never sold any books to Kingsley Book Shops? A. I said I don't know who Kingsley Book Shops is. If you tell me the individual, maybe I could talk a little more sensibly.

1026 Q. Did you ever send bills to anyone? A. Sure I send bills to people.

Q. Do you remember sending a bill to Kingsley Book Shops? A. What is the man's name? Can I find out the man's name?

Justice Galloway: Well, did you ever bill Kingsley Book Shops. That's what the question is.

The Witness: Here's what I think he is getting at—

Justice Galloway: No, no. Just a minute. Did you ever send a bill to Kingsley Book Shop?

The Witness: Not to my knowledge.

Justice Galloway: All right.

Q. Did you sell any of these black and white books—these black and whites—Nutrix Publishing Company—to one of the Kingsley Book stores on 42nd Street in New York City? A. No, I did not.

Q. Were you ever, on any occasion, personally in the Kingsley Book Shop on 42nd Street delivering books that you yourself printed? A. No, I did not. 1028

Justice Gassman: Well, outside of the defendant's store on West 42nd Street, did you ever personally deliver any books to any other bookstore on West 42nd Street?

The Witness: I delivered books to a lot of stores for Mr. Mishkin.

Justice Gassman: But aside from any books that you say Mr. Mishkin ordered you to deliver, did you ever deliver any other books?

The Witness: Yes. I made two sales, both within the same week; one sale to Liberty Book Shop and one sale to the Main Stem Book Shop. 1029 That was the week just previous to my moving the stuff out of the basement and into Brooklyn.

Justice Gassman: Were those sales made for your own account?

The Witness: Those sales were made for my own account. I needed money to finance that operation.

Q. Now, did you just say that you delivered to a lot of stores for Mr. Mishkin? Is that your exact language? A. Yes.

Q. When you say "a lot of stores", how many do you mean? A. Four, maybe five.

Q. Now, isn't it a fact that when the district attorney questioned you on direct examination you mentioned two stores—Publishers' Outlet and Midget?

Mr. Stein: Objection. The question was about, "Normally, what do you do when you print books for Mr. Mishkin," not "What book stores have you ever made deliveries to?" No such question was posed.

Mr. Kern: Well, that's a matter for
1031 the Court to determine. My recollection—

The Witness: Let me answer. Let me answer.

Justice Breslin: Overruled.
Did you so testify?

Q. Did you say that? A. I said every time—every time a job was completed I took fifty to the Midget Book Store and fifty to Publishers' Outlet, every time a job was completed. Now, once in a while Mr. Mishkin would ask me to drop off a few books to different stores in the area.

1032 Justice Breslin: And there were about three other stores that you delivered to?

The Witness: About three, four; something like that, Your Honor.

Q. All right. Now, these—

Mr. Kern: May I have exhibits—the three slips?

Q. These three exhibits—

Justice Galloway: 73A, B, and C.
Justice Gassman: 73A, B, and C.
Mr. Stein: A, B, and C.

Q. These three exhibits just referred to by the Court, you say, were given to you by the defendant when? A. I think about November—pardon me—October—

Justice Breslin: '58?

A. —beginning of October, '59.

Justice Breslin: '59.

Q. Now, did you do any printing work for Mr. Mishkin after October, 1959. A. No, I didn't.

Q. Now, prior to October, 1959,—by the way, was there any book called "Vice For Sale"? A. 1034
"Vice For Sale"?

Q. Yes? A. I think that was—I think he had a little book up there—I think he had a little book up there called "Vice For Sale". I am not positive about it.

Q. Well, that was your own printing, wasn't it? A. Nope. I didn't do "Vice For Sale".

Q. How about "Naked Paradise"? Was there a book— A. I did that book for Mr. Mishkin.

Q. That was your own, wasn't it? A. That was for Mr. Mishkin, "Naked Paradise".

Q. Did you say that was your own, or Mr. 1035
Mishkin's? A. That was for Mr. Mishkin.

Q. Did you have "Naked Paradise" or "Vice For Sale" among the books at 37 West 20th in January, 1960? A. In January?

Q. Yes? A. Did I have "Naked Paradise"?

Q. Yes. Yes. A. I don't know. Maybe he used it up before that. I wouldn't know.

Q. Don't you remember? A. Maybe he used it up. He had it there, but he could have used it up.

Q. You don't remember whether you had them there? A. I said in January, 1960. A. No, I don't remember that.

Q. You don't recall that, do you? A. I don't recall it.

Q. Do you remember when you printed "Naked Paradise"? A. "Naked In Paradise"—

Q. "Naked Paradise". A. —oh, that goes back. That goes back, I would say, beginning of '58, possibly—

Q. Sure. A. —or maybe '57. I don't know.

Q. You printed them yourself in 1957, didn't you? A. I printed them myself?

1037 Q. For yourself, isn't that right? A. Absolutely not. For Mr. Mishkin; I just told you that.

Q. While you had your partner—Mr. Dichter? A. Mr. Dichter? We—

Q. Yes. A. —we—I did work for Mr. Mishkin in 1957.

Q. Well, in any event, around the early part of 1958 or the middle of 1958 that was out of stock. You didn't have any more of those did you? A. We had it around for quite a while. I wouldn't say we were out of stock. We had it around for quite a while.

1038 Q. When would you say you were out of stock—Pardon? A. I don't know when we were out of it. Sometimes when we were out of a book, I would report to him and I would print up some more of them; like, for instance, "Queen Bee" or some more of the other good books.

Q. Did you print "Naked Paradise" in 1958 or 1959? A. I didn't print it in 1959.

Q. Did you print it in 1958? A. It would be either the beginning of '58 or late in '57.

Q. And you would say the beginning of '58 was the last printing of "Naked Paradise", is that right? A. That's right.

Q. How many did you print? A. Twenty-five hundred.

Q. Were they distributed? A. Pardon me. Do you have a copy of that book here?

Q. No. I am asking you were they distributed? A. Were they distributed?

Q. Yes? A. In the usual manner.

Q. Well, now, you remember everything else. Tell us when they were distributed?—"Naked Paradise". A. What do you mean, "when"? He distributed a few at a time. 1040

Q. When was the last one gone? A. I don't know when.

Q. And yet in October, 1959, you say Mr. Mishkin ordered you to bring fifty copies—not fifty—fifty copies of "Naked Paradise" to somebody? A. So what? So what? So we had them there.

Q. This was in October, 1959? A. He still had them. It was a dud.

Q. He still had them, or you still had them? A. He still had them. It was a dud. It was a dud. There was a lot of duds we had.

Q. You testified a minute ago that you didn't know whether you had any. A. Well, if it is 1041 on the slip, then we must have had it.

Q. You said—

Mr. Stein: Counsel is just—objection.

A. If it is on the slip, Counsel—if it is on the slip, we must have had it.

I don't know what he is talking about.

Mr. Stein: Just a minute. Counsellor tells the witness, "You had this book in the warehouse;" and the witness said, "It was a dud," obviously in reference to the contents.

Justice Breslin: Sustained.

The Witness: That was there so long.

Q. When did you print "Vice For Sale"? A. I didn't print "Vice For Sale," I just told you.

Q. Who printed "Vice For Sale"? A. I don't know who printed "Vice For Sale".

Q. How many copies of "Vice For Sale" did you have on hand in January, 1960? A. Mr. Mishkin would know that better than I would.

Justice Galloway: Do you know?

1043 The Witness: I don't know.

Justice Galloway: If you don't know, say, "I don't know."

The Witness: I wouldn't know.

Q. Do you know how many you had during the year 1959? A. Nope.

Q. You were present when the police took everything out of this room, this boiler room, at 37— A. That's right.

Q. —West 20th Street, weren't you? A. I didn't even go into the boiler room. I stood outside the boiler room.

1044 Q. You were present when the books were taken out, weren't you? A. They were taken out in cartons.

Q. And you know what books were moved down into the boiler room from Room 908, don't you? A. Every book that was in 908 was moved into the boiler room, every book.

Q. Did you ever keep any records? A. I kept some records, but I would always turn them over to Mr. Mishkin, inventory sheets.

Q. All right. Now, who made up the inventory sheets? A. I made up the inventory sheets.

Q. And you knew what books you had in any given month before the year 1959? A. I would make up a list. I would go and check it and give the slip to Mr. Mishkin.

Q. All right. Now, based upon your recollection, how many copies of "Vice For Sale" did you have in July, 1959? A. I don't know.

Q. Did you have any?

Mr. Stein: Objection. This is entirely irrelevant.

Mr. Kern: Oh, this is— 1046

Justice Breslin: Overruled. Answer.

Q. Did you have any? A. I'm not sure. There may have been. There maybe wasn't—first of all, it wasn't a good number. If that's what you have in mind, it wasn't a good number.

Q. Well, you remember everything about all these books in evidence. You don't know how many "Vice For Sale" you had or how many "Naked Paradise" you had. A. Well, for instance, that "Queen Bee" was a very good book. I printed it three or four times.

Q. Mister—I know. And you don't know— 1047
you don't know whether or not you had any "Naked Paradise" or "Vice For Sale" in July, 1959, or after that, do you? A. I say it may have been up there.

Mr. Stein: Objection.

A. I don't know for sure.

Mr. Stein: Objection.

Justice Breslin: Overruled.

Mr. Stein: Just a minute. Now, Mr. Kern is putting—making statements—

Mr. Kern: This is on credibility.

Mr. Stein: —which I say are not so. Your Honor, I want to press this. Mr. Kern states, "Now, you remember everything about these books,—

Mr. Kern: And so he does.

Mr. Stein: —yet you don't remember how many copies of 'Vice For Sale' was in the warehouse." Now, this witness never testified—

The Witness: Can I answer. Let me answer.

1049

Mr. Stein: —how many copies of each of these books were in the warehouse.

Mr. Kern: All right, Mr. Stein.

Mr. Stein: And Mr. Kern's question implies that.

The Witness: Can I say something.

Justice Galloway: Just be quiet, and you will do better.

Justice Breslin: If you want to object to it as argumentative, you may make your objection on that ground.

1050 Q. You say you kept inventories, right? A. I didn't—I just took them. I gave them to Mr. Mishkin.

Q. All right. This was a daily, or a weekly, or a monthly inventory— A. Every couple of months.

Q. So that you would be able to tell if anybody ordered merchandise, how many of each you had, would you? A. No. Mr. Mishkin would know what I had.

Q. You made up these sheets, didn't you? A. I made them up mechanically and just gave them to Mr. Mishkin.

Q. All right. Were you conscious when you wrote the name and number of books? A. I didn't pay any attention. I just counted, and that's it.

Q. You counted them? A. That's right.

Q. When you came to a conclusion whether it was fifty or sixty you wrote it down somewhere? A. I wrote it down on the inventory sheet.

Q. All right. Do you remember taking inventory in July, 1960? A. No, I don't remember it. 1052

Q. In August, 1960? A. I don't remember it.

Q. In September, 1960? A. I don't remember when I took it.

Q. You don't want to remember.

Mr. Stein: Objection. I ask it be stricken.

Mr. Kern: I withdraw it. I am sorry.

Justice Breslin: Strike it out. Don't do that, Mr. Kern.

Mr. Kern: I am sorry.

Justice Breslin: How often did you take inventory, sir, whether it be in— 1053

The Witness: From the time that the fellow that took care of the warehouse left. I took care of the warehouse for Mr. Mishkin about six months all told.

Justice Breslin: Was it only during that period that you took inventory?

The Witness: That's right. That's all. And during that time I gave him three or four inventory sheets.

Justice Breslin: Three or four inventory sheets.

Justice Galloway: All right.

Q. How many copies of "European Brothels" did you have in July, 1959? A. "European Brothels"?

Q. Yes? A. That was a dog, I think.

Q. I didn't ask you that. How many copies did you have— A. See, that's how I remember, Mr. Kern. I remember that.

Q. Did you take inventory? A. Yes, I took inventory.

Q. How many copies did you have, if you
1055 remember? A. Exactly you want to know? I don't know.

Q. About? A. I would say about half the original printing approximately.

Q. What was the original printing? A. Twenty-five hundred.

Q. Did you print "European Brothels"? A. Yes, I printed "European Brothels".

Q. You are sure about that? A. Definitely.

Q. All right. Now, how many did you have in January, 1960? A. I imagine we still had some left, I think.

Q. Now, Mr. Levenberg, you said there were
1056 twenty-five hundred printed, the book was a dog, "European Brothels", you had half in summer, 1959. A. I think—

Q. Just a minute. The book was a dog. How many did you have on January 12, 1960? A. I can't tell what we had. We had some.

Q. Were they down in the basement? A. Yes, they were down there.

Q. All right. A. They were moved down to the basement.

Q. All right. Will you pick out "European Brothels"?

Mr. Stein: Objection, Your Honor.

A. Well,—

Q. Now, the police seized all the books, didn't they?

Mr. Stein: Objection, Your Honor. And the point of my objection is this: That we were introducing in evidence and stating in the information that certain books are pornographic, that certain books come within the statute of limitations,— 1058

Mr. Kern: All right, Counsel is right.

Mr. Stein: —that the defendant may be charged with that—

Mr. Kern: I am sorry. Counsel is right.

Mr. Stein: —that doesn't mean that this—

Mr. Kern: All right. Mr. Stein is absolutely right.

Q. Mr. Witness, the police seized all the books down in the basement, isn't that correct? A. That's right.

Mr. Kern: Now, if the Court please, I 1059
respectfully ask the district attorney to produce a book called "European Brothels".

Mr. Stein: Your Honor, I will produce that book in five minutes.

Mr. Kern: All right.

Justice Galloway: Better save it for tomorrow morning.

Justice Breslin: Yes, save it until tomorrow. Do you expect to be much longer with this witness?

Mr. Kern: About an hour.

1060 *People's Witness, Norman Levenberg, Cross*

Justice Breslin: All right. Tomorrow morning. We will take a recess now until tomorrow morning at ten-thirty.

(This is to Certify that the foregoing is a true and correct transcript of the within proceeding as recorded by me.)

PAUL H. PETERSON
Official Court Reporter

1061

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October 26, 1960

Court Officer: Six—Edward Mishkin.

Mr. Kern: May we just approach the bench for a second?

(Messrs. Stein and Kern confer off the record with Their Honors.)

MR. LEVENBERG retakes the witness stand:

Court Officer: Just have a seat, please. You
1062 are still under oath.

Mr. Kern: May I?

Justice Breslin: Yes.

*Cross Examination by Mr. Kern (continued):*

Q. Mr. Levenberg, did I understand you to say yesterday that you have been in the printing business for five or six years? A. In business for myself. You mean in business for myself?

Q. In business for yourself five or six years? A. Yes.

Q. But before that you had been in the printing business for a long time? A. I was a printer. I wasn't—I worked for other people.

Q. But in the printing business, is that correct? A. That's right, sir.

Q. Now, when did you say you moved from 36 West 20th Street? A. 37 West 20th Street.

Q. 37? A. In about May of '59.

Q. 19—

Justice Galloway: I can't hear you.

The Witness: May of '59. 1064

Q. And you had files, did you not? A. I had a file, yes.

Q. And you had a desk, did you not? A. No, I didn't have a desk.

Q. Well, you had a set of books, did you not? A. I had a file, and I had a set of books.

Q. You had a correspondence file, didn't you? A. What do you mean by a "correspondence file"?

Q. Well, did you ever write letters to anybody? Did you ever send bills to anybody? A. Yes. 1065

Q. You had a file which contained the letters? A. I had a bill book. I had a bill book. I had my check book.

Q. Yes. And you took all of those books. You also had income tax return forms, did you not, your copies of income tax returns? A. Income tax return forms?

Q. Income tax returns. Copies of returns you made to the United States government? A. I didn't keep them in my place, no. I kept them home.

Q. You kept them at home. You still got them, haven't you?—at home. A. Oh, sure.

Q. Now, these records—the check book and bills and vouchers and receipts—you had delivery receipts—a file for delivery receipts, didn't you? A. No, I didn't. I don't keep delivery receipts.

Q. You mean you made deliveries and you never got a receipt for deliveries made, is that correct? A. That's correct.

1067 Q. And you had a file— A. Sir, when I made —whenever I made a delivery to Dora May I do have to give them—have a receipt for that in order to get paid.

Q. All right. Now, you had a file which contained those receipts, did you not? A. It was a file—a loose file.

Q. All right. A. I didn't keep it too strict.

Q. All right. Now, you also had a file which contained your monthly inventory sheets, did you not? A. No, I did not.

Q. Didn't you keep any record of inventory from month to month? A. What kind of in-

1068 ventory. What kind of inventory?

Q. Inventory which you took, or at least you say you took.

Justice Galloway: He is referring to the books—

The Witness: To the books?

Justice Galloway: —on which you made an inventory.

The Witness: Yes, I see.

Justice Galloway: Mr. Witness, pay attention. When you made an inventory of those books, didn't you keep a duplicate for yourself?

The Witness: Oh, no, sir.

Justice Galloway: You didn't?

The Witness: No.

Justice Galloway: You just gave him the sheet?

The Witness: I just gave him the sheet; that's all.

Justice Galloway: All right.

Q. Now, when you moved over to your new quarters, you moved all your furniture with you, did you not, the desk, the file? A. I had no desk. I had the file cabinet— 1070

Q. Yes? A. —and the press.

Q. You moved it all over, didn't you? A. That's right.

Q. All right. Now, at the end of the year 1959 you were still—you were at what address? A. 250 West 49th Street.

Q. All right. And your merchandise was still there; that is, your filing cabinet, your books, and your records, isn't that correct? A. That's right.

Q. And when the police seized these books in December of 1959 and in January of 1960 you still had those records at your place of business, did you not? A. I don't know if they were still up there. 1071

Q. Did you destroy them? A. No. You see what happened, sir—

Q. No, no. Did you destroy them? A. No, I didn't destroy them.

Q. Are you still there at that address? A. No, I'm not at that address.

Q. What happened to the filing cabinet? A. The fellow that—that leased that loft—that I moved my press into, he had a tax lien against

him by the United States government. They put him out of business, and I don't know what happened to the filing cabinet and all the stuff in it.

Q. Did you take the contents of the cabinet out? A. No, I didn't take the cabinet out.

Q. Did you take the check book out? A. No, I didn't. I don't remember taking it out.

Q. All of these books were contained in this filing cabinet, is that right, all these records that
1073 we are talking about? A. I was locked out. When they locked him out, naturally I was locked out of there, too.

Q. Now, what's the name of this man? A. Mike Rose.

Q. Mike Rose? A. Mike Rose Rebar Company.

Q. Mike Rose Rebar Company? A. Correct.

Q. And is Mr. Mike Rose the principal of that firm? A. He was the owner, that's right.

Q. Do you know where he lives? A. Somewheres in the Bronx.

Q. When did you see him last, do you know? A. Oh, I know where—I know where he works.
1074 I see him once in a while.

Q. Where does he work now? A. He is at Sperber Press.

Q. Sperber—? A. Sperber Press, 234 West 56th.

Q. 234 West 56th. All right. Now, sir, you received a lot of cash, didn't you, in payment, you say, from the defendant? A. From Mr. Mishkin.

Q. And you had a bank account, did you not? A. My wife's bank account.

Q. Didn't you have a bank account? A. No, I didn't use a bank account.

Q. Wasn't there a bank account in the name of the business Norman Offset Company? A. Not from the time I moved up to—up to Rebar's place.

Q. How about the time before you moved to Rebar's place? A. I had a bank account at that time.

Q. In what bank? A. In the—I had an account in the Chemical Corn Exchange Bank.

Q. What branch? A. On 20th and 5th Avenue.

Q. Any other banks? A. Well, previous to 1076
that, of course, when I was with—with Mr. Dichter we did our banking at the Commercial State Bank on 5th Avenue, also.

Q. Now, did you deposit the cash in these banks as well as checks? A. Yes, we did.

Q. Did you have any safe deposit boxes? A. No.

Q. Now, this piece of property that you purchased in Suffolk County—Farmingdale is Suffolk or Nassau? A. Well, that's Nassau.

Q. You paid in cash for that, did you not? A. I paid cash? I mortgaged—

Q. Didn't you pay cash? A. I have a mort- 1077
gage.

Q. You paid some cash, did you not, above the mortgage? A. Yes, I did.

Q. In currency, is that correct? A. It was a check. I gave them a check for the down payment.

Q. How about at the time of closing, did you give them cash? A. A check.

Q. Only a check? A. It was a check.

Q. You are sure about that? A. Positively.

Q. All right, sir. Now, is it not a fact that you printed and sold, you, yourself, to Kingsley,

1078 *People's Witness, Norman Levenberg, Cross*

books on West 47th Street—West 42nd Street, one volume, or a number of these books titled "La Femme Volpente"? A. That sale was made in '57—

Q. In '57? A. —and Mr. Mishkin was a partner there with another fellow. It was still sold to Mr. Mishkin.

Q. Now, I am asking you directly and specifically, did you, or did you not, during the year 1958 or 1959, print for yourself and sell for
1079 yourself to Kingsley Books, as well as 1957, too, this book called "La Femme Volpente"? A. Absolutely not.

Q. You are sure about that? A. Correct, I'm sure about that.

Q. All right, sir. All right. Now, you haven't got one single paper of the type or of the class to which I am referring; that is, receipts, inventories, your check book, check stubs, cancelled vouchers, nothing like that today except copies of your income tax returns? Am I right about that? A. That's basically right, sir.

Q. And these records all disappeared in De-
1080 cember of 1959? A. They disappeared along with the file cabinet that was up at 250 West 49th Street.

Q. In December of 1959, is that correct? A. When they put Mike Rose out of business.

Q. Was that in December, 1959? A. December or the following month. It may have been January they put him out of business.

Q. All right. Isn't it a fact that you had those files or that particular file in your place of business until the end of February, 1960? A. It may have been up at Rebar. I wasn't—I don't think I was up at Rebar after January.

I never—I don't think I went up there any more.

Q. Isn't it a fact that you had possession of, and access to, that file up until the end of February, 1960, no matter where it was? A. I'm not sure about that answer.

Q. You may have had them, is that correct? A. I may have had access to it.

Q. And that's because you don't remember very well, isn't that correct? A. I don't remember that particular phase of it.

Q. All right. Did you, at the time you talked with Inspector Plansker, talk with him about those records and that file? A. No. 1082

Q. Did he ask you about these documents, these receipts for deliveries, these invoices, the inventories?

Mr. Stein: Objection.

Justice Breslin: Overruled.

Mr. Stein: Counsel was first asking the witness for records concerning any sales he may have made to anyone. Apparently he is now concerned with the defendant. I wish he would specify that if that is the— 1083

Mr. Kern: I asked—I specified vouchers; I specified receipts—delivery receipts.

Justice Breslin: Objection is overruled. Go ahead.

Mr. Kern: Yes.

Q. Did you tell Inspector Plansker that you had such documents? A. Inspector Plansker showed me something which he had taken out of my file cabinet.

Q. Well, now, when did Inspector Plansker go to your file cabinet? A. When he first—I guess it was on the first day that he contacted me.

Q. That was in December of 1959, wasn't it? A. That's right.

Q. And there was no question but that you had that cabinet in your place of business? A. Yes.

Q. All right. Did you show him delivery receipts? A. Nope.

1085 Q. Did you show him inventory slips? A. Nope.

Q. Did you show him your check book? A. Nope.

Q. Did you show him any documents that you may have received at any time from the defendant? A. Nope.

Q. Didn't he ask you for such papers? A. At that time?

Q. Yes. A. The first time he met me?

Q. Yes? A. He didn't ask me for those papers.

Q. Didn't he ask you for those papers, and didn't you say you would give them to him—

1086 A. Absolutely not.

Q. —when you decided to cooperate? Do you say now—

Mr. Stein: Objection.

Justice Breslin: Overruled.

Mr. Stein: Counsel added—

Justice Galloway: He said, "Absolutely not." That was his answer as I recall it.

Mr. Stein: But Counsel added, "when you decided to cooperate"—

The Witness: He changes the date.

Mr. Kern: Yes.

Mr. Stein: —when Inspector Plansker first talked with the witness.

Mr. Kern: No. I said, "Did you promise to give them to him when you decided to cooperate?"

Justice Breslin: All right. Suppose you —Sustained. Withdraw it.

Mr. Kern: All right.

Justice Breslin: Rephrase your question. 1088

Q. Did you, in your conversation with Inspector Plansker, say, in words or substance, "I will give you all these records if I decide to cooperate?" A. When I decided to cooperate with Inspector Plansker he did ask me for records, and I told him I haven't got those kind of records.

Q. But you had them, did you not? A. I told you, I didn't have those records.

Q. Didn't you say— A. Didn't I just say I didn't have those records?

Q. Didn't you just say you decided to cooperate about the beginning of January, 1960, when you made this deal for the cops to come and take the stuff out of the cellar? A. I didn't make a deal the beginning of January. I said the middle of January. 1089

Q. All right. They went there, and you met them in the basement January 12, 1960, isn't that correct? A. Okay. Correct.

Q. Then you decided to cooperate, and you told the inspector you would cooperate on that day or before that day, isn't that correct? A. Not before that day.

Q. On that day? A. On that date.

Q. And on that day and at that time you still had the file, isn't that correct? A. The file was up there.

Q. All right. Didn't you destroy the papers and the documents in that file? A. I never—I don't even think I ever went back up there.

Q. But you didn't give them to— A. I never went back up there.

Q. You didn't give them to the inspector, did you? A. I didn't give them to the inspector.

1091 Q. Although you promised you would give them to him? A. I told him—

Mr. Stein: Objection. Objection.

A. —I—

Mr. Stein: Just a moment. Just a moment. Objection. Objection. Just a minute. Counsel is asking about an agreement between Inspector Plansker and this witness concerning this defendant.

Mr. Kern: That's right.

Mr. Stein: Now, this witness has previously testified that he had no documents

1092 concerning this defendant in his file cabinet, and Mr. Kern is now implying that he withheld from Inspector Plansker—

Mr. Kern: Excuse me. I am only asking. I have a right to ask.

Mr. Stein: —documents concerning this defendant.

Mr. Kern: This is cross examination.

Justice Breslin: He has a right to ask. Overruled.

Mr. Stein: I think he ought to make the question clear.

Mr. Kern: All right. No. It is a question.

Q. All right.— A. Give me the question again.
Q. Let's be clear about it. Any documents—

Justice Galloway: Is that clear? What do you mean, "any documents"?

Mr. Kern: Any documents in the file. We are talking about the documents in the file.

Justice Galloway: Reframe the whole question, because the record will look very bad. 1094

Q. Now, you said you had in the file a check book, you had some delivery receipts, you had some inventory sheets. Did you have any record of the quantity of the books you had or the names of the books, any records at all, in that file? Did you give those records to Inspector Plansker or any assistant district attorney or any police officer at any time? A. I don't know what was in the file, but I didn't give anything from the file to the police.

Q. Oh, you don't know what was in the file, is that right? A. I'm not sure what was in there, yes. 1095

Q. All right. Now, at 908 in 37 West 20th Street, Room 908, you had a lease for that premises, is that correct? A. Correct.

Q. That was in your name, is that right? A. Correct.

Q. Now, when you moved the stuff down into the basement, you did so with the consent of the superintendent of the building, is that right? A. That's right.

Q. Did you get a lease on that? A. No.

Q. Did you pay a rental for it? A. No, sir.

Q. Did you pay any money to the superintendent? A. Yes, sir.

Q. How much did you pay him? A. Oh, quite a few hundred bucks.

Q. Every month, is that correct? A. No.

Q. Or at one time? A. A few different payments.

Justice Breslin: How much did you pay for the rental of the room 908?

The Witness: A hundred dollars a month, Your Honor.

Justice Breslin: Did you pay for that?

The Witness: Mr. Mishkin gave me the money.

Justice Breslin: Cash?

The Witness: Gave me cash every month to pay.

Justice Breslin: How about the money that you paid the superintendent for the use of that boiler room in the basement?

The Witness: I got a little bit of that money out of Mr. Mishkin, but not as much as I had to pay him.

Justice Galloway: Well, was this a sort of a smear? There was no agreed amount that you would give him?

The Witness: That's what it was. The guy was hiding the stuff for me down the cellar, and I had to pay out—I had to shell out.

Justice Galloway: You would give him a smear whenever he went after you for it?

The Witness: That was it.

Q. Just one thing further. This money that you gave the super for the use of the basement quarters, you say you got a little bit of that

money from Mr. Mishkin, is that right? A. That's right, sir.

Q. Isn't it a fact that Mr. Mishkin never gave you any money for that? A. No, that's not a fact. He gave me some money.

Q. All right. When you say you got a little bit of that money, what do you mean by "a little bit"? A. He gave me a couple hundred dollars toward it.

Q. How much did you pay altogether, about twelve hundred dollars? A. I didn't give the 1100 super that much, no.

Q. A thousand? A. I would say I gave about five—between the super and the porter it must have cost me about six or seven hundred dollars.

Q. Yes. And you say that—you testified that all of these books belonged to the defendant? A. That's correct.

Q. And he paid a little bit of that money; you paid the rest of it, is that correct? A. That is correct, sir.

Q. You did that as a matter of good will and generosity, is that correct? A. No, I didn't. 1101
No, sir.

Mr. Kern: That's all.

A. The books—the books were in my name.

Mr. Kern: That's all. I have nothing else of this witness.

Justice Breslin: All right. Mr. Kern, we have gone over the Grand Jury testimony; and as I indicated before, there are some variations in the testimony, particularly with reference to the dates when some of these books were allegedly printed

by this defendant. There are instances, I believe, where he testified that the particular item was printed in May of 1959, whereas the testimony in the Grand Jury indicates that he testified it may have been printed in April.

Mr. Kern: Well, that's not very—Yes?

Justice Breslin: And also as to the amount. In some instances he indicated for the Grand Jury that there were five
1103 hundred printed of a particular item. His testimony here is that there were about a thousand printed.

However, there are two points here in his testimony we wish to point out, and we consider these of sufficient importance to warrant submission of these minutes to defendant's counsel for the purpose of further cross examination if he sees fit; and that is testimony of Levenberg, Page 290, Grand Jury minutes; and that is with reference to the transfer of the books from Room 908 to the basement of the
1104 premises.

Mr. Stein: That's limited to Page 290, is that correct, Your Honor?

Justice Breslin: Yes.

Justice Galloway: No. Wait a minute.

Justice Breslin: Wait a minute now.

Justice Galloway: It is not limited to 290. It starts at 290.

Justice Breslin: Yes, Page 290. What is the other one? And—

Justice Gassman: We have marked out that part there so that you don't go beyond there.

Justice Breslin: All right. Also, Page 42 of the Grand Jury testimony, particularly that portion thereof which refers to the cardboard—the pictures,—

Mr. Kern: Yes.

Justice Breslin: —numbers—the particular numbers of which escape me at the moment, but they are all those big cards which you—

Mr. Stein: There are no inconsistencies.

Justice Breslin: What?

Mr. Stein: That's not an inconsistency. 1106

Justice Galloway: It is deemed an inconsistency.

Justice Breslin: We find that there is sufficient there to warrant the submission of these to defendant's counsel.

Mr. Stein: All right.

Mr. Kern: How many pages may I read?

Justice Breslin: Just 42—

Justice Gassman: Down there. Just one page, 290. That is marked out.

Mr. Kern: Just one page, 290. 1107

Justice Breslin: Just 42 and 43.

Mr. Kern: It will take me just a moment.

Justice Breslin: To the witness: I think that your testimony was that those big cards you kept in your home at home, is that correct?

The Witness: That's correct, sir.

Justice Breslin: All right. 42 and 43. That's all?

Justice Gassman: That's all.

Justice Breslin: Mr. Stein, would you give these to Mr. Kern?

Mr. Stein: Yes.

Justice Breslin: 42 and 43. All right, the rest of this testimony we will return to you, Mr. Stein.

*Cross Examination by Mr. Kern (continued):*

Q. All right. Mr. Levenberg, you testified, did you not, yesterday that when you—or just
1109 before you moved the books from Room 908 down into the basement you had a talk with Mr. Mishkin about the police being around,—A. That is right.

Q. —getting rid of the stuff, or something like that, isn't that correct? A. Yes, I talked to Mr. Mishkin.

Q. That's what you testified to. By the way, were you at Publishers' Outlet Store on West 42nd Street about three weeks ago or four weeks ago inquiring for Mr. Mishkin? A. No, sir.

Q. You are sure about that now? A. Posi-
1110 tively.

Q. All right. Now, you testified yesterday that Mr. Mishkin asked you to get rid of the books, isn't that correct? A. He asked me to get rid of the books?

Q. Yes. To move them down to the basement or some other place? A. No, he didn't ask me to move the books down to the basement.

Q. Didn't you testify yesterday that he asked you to move the books down to the basement—A. No, he didn't ask me to move the books down to the basement. He asked me to get the books

out of the whole building. He didn't ask me to get them into the basement.

Q. At whose suggestion did you move them into the basement? A. At whose suggestion?

Q. Yes? A. It was my idea.

Q. Mr. Mishkin didn't tell you to do that? A. No, Mr. Mishkin didn't tell me to do that.

Justice Breslin: He said, "Get rid of the books"?

The Witness: He told me, "Get the books out, if you can." 1112

Q. And it was your idea to move them down into the basement? A. That's right.

Q. All right. Yesterday you also testified that with reference to these pictures, People's Exhibit—well, 28A and others in the same series—you know the pictures that I am talking about—these drawings—these illustrations—you said you had these pictures at your home, is that correct? A. That's correct.

Q. And that you took them from your home and turned them over to your lawyer? A. That's correct. 1113

Q. And you did that in what month? A. When my lawyer asked me to bring all the evidence up to his office.

Q. When was that? A. January.

Q. January of 1960? A. Correct.

Q. Now, you didn't take these pictures from your home and deliver them right to your lawyer's office, did you? A. Why didn't I? Yes, I did.

Q. Did you? A. Yes.

Q. Are you sure about that? Your memory is very good on that subject? A. Yes. I took them from my home.

Q. No question about that? A. No question.

Q. Right to the lawyer's office? A. Right to the lawyer's office.

Q. Didn't you deliver them to some friend of yours first? A. Tech—it is a little—it is a technicality. I had them across the street in my friend's place for a while there. I was afraid the cops might come out to my house. I didn't want it in my house.

Q. Then you took them back from your friend?

1115 A. Then I took them back.

Q. And gave them to your lawyer? A. And gave them to my lawyer. He is right across the street and—

Q. What is his name?

The Witness: Do I have to give him this answer?

Justice Breslin: Give him the name.

Q. What's his name? A. Leventhal.

Q. And his first name? A. Sheldon.

Q. And his address? A. Let's see. I am 7 Evans Avenue. He must be 10 Evans Avenue.

1116 Q. What avenue? A. About 10 Evans Avenue.

Q. Evans Avenue. A. He don't know what was in there. It was all wrapped up. It was all wrapped up. He don't know what was in there. I just put a package in his house.

Mr. Kern: That's all, Your Honors.

Mr. Stein: Thank you very much, Mr. Levenberg. That's all.

Justice Breslin: Step down, sir.

Mr. Stein: Mr. Paul Hayman.

PAUL HAYMAN, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: Be seated. Keep your voice up. What is your name?

The Witness: Paul Hayman.

Court Officer: What is your address?

The Witness: 92 Franklin Avenue, in Brooklyn.

Court Officer: What is your business or occupation? 1118

The Witness: As a printer.

*Direct Examination by Mr. Stein:*

Q. Mr. Hayman, approximately how long have you been a printer? A. About fifteen years.

Q. And what kind of printing do you do? A. Offset and letter-press printing.

Q. I ask you to look at the defendant. Do you know him? A. Yes, sir.

Q. Approximately how long do you know him? A. About eight years.

Q. Have you ever done any work for him? A. Yes, I have. 1119

Q. What kind of work, sir? A. Printing.

Q. Printing of what, sir? A. Books.

Q. I show you People's Exhibit 31—May I have this package of books here, please?—People's Exhibit 31 for identification, sir; and I ask you if you can identify it? A. Yes, I can.

Q. What is it, sir? A. It is a series of pictures with accompanying text.

Q. Can you tell us anything more about it? A. I have never read the text. I printed the job, though.

1120 *People's Witness, Paul Hayman, Direct*

Q. For whom did you print it? A. Mr. Edward Mishkin.

Q. Did he request that you print it? A. Yes.

Q. Were you paid for it? A. Yes, I was.

Q. By whom? A. Mr. Mishkin.

Q. Personally? A. Yes.

Q. In what form? A. In cash.

Q. Where? A. At Publishers' Outlet on 42nd Street.

Q. In New York County? A. Yes.

1121 Mr. Stein: I offer this in evidence.

Mr. Kern: May I see it?

Justice Breslin: Has he testified when he printed it?

Q. When did you print it, sir? A. Oh, back in spring of 1959.

Justice Gassman: Were all these three printed at the same time or different times?

The Witness: Sir? Three?

Justice Gassman: Which one did you show him, only one?

1122 Justice Breslin: 31.

Justice Gassman: 31?

Mr. Stein: Yes, Your Honor, People's Exhibit 31, a book entitled "The Strap Returns".

Justice Gassman: Do you know what month in 1959 you printed them?

The Witness: Oh, probably about March.

Q. Would you recall approximately when in March you printed this, sir? A. Pardon?

Q. Would you recall when in March, approximately, you printed this? A. No, sir.

Mr. Stein: I offer it in evidence.

Justice Breslin: How many did you print of this?

The Witness: About three hundred.

Justice Breslin: I see. All right, received in evidence as People's Exhibit 31. (So marked.)

Where was your plant, sir, at the time?

The Witness: At 92 Franklin Avenue, in Brooklyn. 1124

Justice Breslin: How much were you paid for the printing—

The Witness: Forty cents a copy.

Justice Breslin: —of these?

The Witness: It would be $120.00.

Mr. Stein: May the record reflect that People's Exhibit 31 is a book entitled "The Strap Returns". It consists of 50 pages. There is no price on the book. There is no name of a publisher.

Justice Gassman: Did that forty cents include binding? 1125

The Witness: Yes, sir.

Q. Who bound this book, Mr. Hayman? A. Actually, it never was bound. It was just collated, assembled this way. It was—

Q. You just assembled it in that manner? A. Yes.

Justice Gassman: How many pages are there in that book?

Justice Galloway: Fifty.

Justice Breslin: Fifty. May I see the book?

Justice Gassman: Fifty pages.

Q. Sir, I show you People's Exhibit 32 for identification, a book entitled "Dangerous Years"; and I ask you if you can identify this book? A. Yes, I can.

Q. What is it, sir? A. It's a book entitled "Dangerous Years".

Q. What else can you tell us about "Dangerous Years"? A. I've read passages as it's gone through the press.

Q. Concerning the printing of it? A. I did the printing and binding entirely.

1127

Q. For whom? A. For Mr. Mishkin.

Q. At his request? A. Yes, sir.

Q. Were you paid for it? A. Yes, I was.

Q. By whom? A. Mr. Mishkin.

Q. In what form? A. In cash.

Q. Where? A. At his place of business.

Q. Where is that, sir? A. Publishers' Outlet on 42nd Street in New York County.

Q. How much were you paid? A. Forty cents a book.

Justice Galloway: How many books did you print?

1128

The Witness: Also three hundred.

Q. Approximately when did you print it?

Justice Galloway: When did you print it?

A. About the same time, March, 1959.

Justice Gassman: Were these books given to you as books, or were they given to you in manuscript form?

The Witness: I received the plates. I didn't set up a type, but just received the plates as is.

Q. From whom did you receive the plates? A. From Mr. Mishkin.

Q. That would apply to Exhibit 31, "The Strap Returns", as well as "Dangerous Years"? A. Yes.

Justice Breslin: What did you do with the plates after you ran off these 300 copies?

The Witness: Returned them to Mishkin.

Justice Breslin: What?

The Witness: Pardon?

Justice Breslin: What do you do with the plates?

The Witness: Returned them to Mr. Mishkin. 1130

Justice Breslin: What did you do with the 300 copies of these two books?

The Witness: Delivered them to Mr. Mishkin.

Justice Breslin: All at once or at the same time?

The Witness: Well, there were two separate printing jobs. I couldn't carry them all at once.

Justice Breslin: Did you deliver the 300 copies of Exhibit 31, "The Strap Returns", after you printed them?

The Witness: Yes.

Justice Breslin: All right. Has this been offered? 1131

Mr. Stein: 32 has not been offered. I now offer it in evidence.

Justice Breslin: All right. Received, People's Exhibit 32. Do you have the same general objection?

Mr. Kern: Yes. But may I ask a question as to that, first?

Justice Breslin: Yes. Go ahead.

Mr. Kern: Did you personally deliver those books after your printing job was finished to Mr. Mishkin?

The Witness: Yes.

Mr. Kern: Yourself?—delivered them—

The Witness: Well,—

Mr. Kern: —to him, or did you give them to a boy or a truck?

The Witness: It's possible. There are several cartons. I could never carry them all myself. They might have been taken by trucks.

Mr. Kern: Then you don't remember whether you delivered those books to Mr. Mishkin yourself, do you?

1133 The Witness: They may have been delivered personally. They may have been delivered on my—delivered by trucks.

Mr. Kern: Then you don't remember whether you delivered them personally with your own hands to Mr. Mishkin, do you?

The Witness: I wouldn't say. I couldn't say for sure if the entire shipment was taken by me personally.

Mr. Kern: Could you swear that you, yourself, delivered the books to Mr. Mishkin?

The Witness: Some of them I did deliver.

1134 It's possible some may have gone by truck.

Mr. Stein: I think the question has been answered, Your Honor.

Justice Breslin: And the delivery in each instance was made at where, this store at 42nd Street,—

The Witness: Yes.

Justice Breslin: —the Publishers' Outlet?

The Witness: Yes.

Justice Breslin: All right. That is received, People's Exhibit 32. May I see it after it is marked.

(People's Exhibit 32 received in evidence and so marked.)

Mr. Stein: May the record reflect that Exhibit 32 is a book entitled "Dangerous Years". The words "Andiron Press, San Francisco, California" appear on the cover of it.

Q. Are you familiar with the Andiron Press, sir? A. Only that I have seen it on the title of the book, the pages of the book.

Q. Do you know whether Mr. Mishkin has a 1136
firm known as Andiron Press? A. I have no knowledge of such.

Q. Are you known as Andiron Press? A. No, sir.

Justice Breslin: Did you ever operate under that name?

The Witness: No, sir.

Justice Breslin: Did you ever operate your business under that name?

The Witness: No, sir.

Mr. Stein: "Dangerous Years" consists of 91 pages. There is no price marked on 1137
the cover.

Q. Sir, I show you People's Exhibit 33 for identification. I ask you if you can identify this. Oh, I'm sorry. I'm sorry. Can you identify this? A. I have seen it before.

Q. Did you print this? A. This looks like a copy of something I did quite some time ago.

Q. But you are not sure whether you printed it? A. No, I am not sure.

Q. You testified before that you printed these books at Mr. Mishkin's request, is that correct? A. Yes.

1138 *People's Witness, Paul Hayman, Cross*

Q. And did I ask you the form in which he paid you for the second book? A. Yes, sir.

Q. What form was that? A. In cash.

Q. And on both occasions he gave you a volume that had already been printed—plates for such a volume, is that correct? A. Yes.

Q. Did Mr. Mishkin ever give you the name and address of a publisher to put on either of these two volumes, sir? A. No, sir.

Mr. Stein: You may inquire.

1139

*Cross Examination by Mr. Kern:*

Q. Mr. Hayman, do you say that Mr. Mishkin ever gave you a plate? A. Yes, sir.

Q. Mr. Mishkin himself?—or was the— A. Well,—

Q. —or was the plate given to you by Mr. Levenberg? A. Well, the plates were actually left at the store for me. He never did hand them to me personally.

Q. You don't know who left the plates, of your own knowledge, isn't that correct? A. No,
1140 sir. I just received them at the store.

Q. In other words, you are telling the Court now what someone told you as to who left them, isn't that correct? A. I presumed they were left by Mr. Mishkin.

Q. Do you know Mr. Levenberg? A. I have seen him in Mishkins' store.

Q. Was he ever in your place of business? A. No.

Q. Did he ever send any manuscripts to you? A. No, sir.

Q. Did he ever send any plates to you? A. We have had no business together at all.

Q. You are positive that Mr. Mishkin himself in your presence and to your own knowledge—you are positive he never gave you any plates? A. No. They were left at the store for me. He never gave them to me.

Q. By somebody, is that correct? A. Yes.

Mr. Kern: All right. Now, I move that that be stricken from the record as evidence. There is no connection between this particular exhibit and this defendant.

Justice Breslin: That is Exhibit 31 you 1142
are referring to?

Mr. Kern: "The Strap Returns". These are sheets just received in evidence in connection with 31.

Justice Breslin: Is this the first item that you say you printed at the request of Mr. Mishkin?

The Witness: I printed items previous to that several years ago.

Justice Breslin: All right. Well, I mean in this year of 1959, was this the first item that you printed for him during that year?

The Witness: It probably was. I have done 1143
very little work for him.

Justice Breslin: I see. Did you have any conversation with him prior to the printing of that item, the book Exhibit 31 in evidence?

The Witness: Repeat that, sir.

Justice Breslin: Did you have any talk with him before you printed that?

The Witness: I must have spoken to him. Of course.

Justice Breslin: What?

The Witness: I must have spoken to him. Of course.

Justice Breslin: Well, did you speak with him, sir?

The Witness: Prior to printing this job?

Justice Breslin: Yes?

The Witness: Certainly.

Justice Breslin: Where did you speak with him, at his place of business—

The Witness: Yes, sir.

Justice Breslin: —or at yours?

The Witness: His place.

1145 Justice Breslin: How did you happen to go up there?

The Witness: Well, I am continually seeking possibilities of work.

Justice Breslin: Yes? You went up there?

The Witness: Yes, sir.

Justice Breslin: And what conversation did you have with him?

The Witness: Well, I can't tell you word-for-word.

Justice Breslin: No. Tell us the substance of it, if you can't recall the exact words that you had used.

1146 The Witness: Well, it was—

Justice Breslin: Hmm?

The Witness: It would have been a normal solicitation of work.

Justice Breslin: You asked him if he had any work?

The Witness: Yes.

Justice Breslin: And what happened? What did he say, if anything?

The Witness: Well, I made several trips.

Justice Gassman: What?

The Witness: I have made several trips to see his place, but we never—

Justice Gassman: Finally, when you spoke to him, Judge Breslin wants to know what did he say?

The Witness: He asked me if I could turn out the book, how much it costs, give him a quote on it.

Justice Breslin: Did you give him a quote?

The Witness: Yes.

Justice Breslin: How much?

The Witness: Forty cents a book.

Justice Breslin: When you say he asked you if you could turn out this book, what book did he show you? 1148

The Witness: He asked me about a specific number of pages, what could I turn it out for.

Justice Breslin: Yes?

The Witness: And I don't believe he gave me the title of any kind. The title didn't mean anything to me as long as I knew the number of sheets and what had to be done.

Justice Breslin: Yes. So you told him the price would be forty cents?

The Witness: Yes, sir.

Justice Breslin: What happened then? 1149

The Witness: He told me to pick up the plates in a few days.

Justice Breslin: And did you pick them up?

The Witness: They were left at the place—came down—

Justice Breslin: What?

The Witness: —prior in the evening. I worked all day long and picked up the plates that were left for me with my name on them.

Justice Breslin: Where were they left?

The Witness: At the shop. At his place of business.

1150 Justice Breslin: At his place of business?

The Witness: Yes.

Justice Breslin: You got the plates at his place of business—

The Witness: Yes.

Justice Breslin: —for that particular exhibit, People's Exhibit 31?

The Witness: In both cases I picked up the plates at his place. They were left for me.

Justice Breslin: In your name?

The Witness: Yes.

1151 Justice Breslin: Then you ran off these two copies; that is, printed 300 copies of Exhibit 31 and Exhibit 32, is that correct?

The Witness: Yes, sir.

Justice Breslin: How much time elapsed between the two printings.

The Witness: Probably a week.

Justice Breslin: What did you do with the plates, sir, after you were through with them?

The Witness: They were returned with the job.

Justice Breslin: Did you receive plates in

1152 each instance?

The Witness: Yes, sir. I don't have the facilities for making my own plates.

Justice Breslin: I see. All right, your objection—

Mr. Kern: May I continue?

Justice Breslin: Yes. Go ahead. Do you withdraw your objection at this time?

Mr. Kern: Well, I—I will withdraw it.

Justice Breslin: Do you press it?

Mr. Kern: I will withdraw it at this time.

Justice Breslin: All right.

Q. Mr. Hayman, you say you went to the defendant's place of business to discuss the possibility of getting work? A. Yes.

Q. Now, you had never seen him before? A. I had seen him previously.

Q. Now, he asked you how soon you could turn out pages for books, is that correct? A. He asked me for a price on them.

Q. All right. Did he give you a name of a particular book, or did you talk generally about the kind of work that he wanted done? A. It 1154
was just a specific number of pages in a book.

Q. The specific number of pages in a book, but not for any particular book, isn't that correct? A. No, he didn't give me a title at the time.

Q. All right. And then, as a result of this conversation, you picked up a plate, is that correct?—or plates? A. It would be a series of plates.

Q. Now, when he talked with you about business, you are sure he said nothing about any particular book; that's correct, isn't it? A. I think that's reasonable. 1155

Q. And then you picked up plates that were left for you by somebody, is that correct? A. It had my name on it.

Mr. Kern: I renew my objection, and I renew my motion.

Justice Breslin: Overruled. We will take them. They have been received. 32—That motion was addressed to 31, wasn't it?

Mr. Kern: Yes.

Justice Breslin: All right. Overruled.

Mr. Kern: I respectfully except.

Q. Now, when did you first see the detectives or the district attorney in this case? A. About February 13 or 14 of this year.

Q. 1960? A. Yes, sir.

Q. And you were at your place of business? A. Yes, sir.

Q. Police came in? A. Yes, sir.

Q. Found a number of lewd and obscene pictures in your possession? A. Yes, sir.

Q. They threatened to arrest you, did they not? A. I don't think the question came up concerning the arrest.

1157

Q. Well, Mr. Hayman, they said they would arrest you unless you cooperated in the prosecution of Mishkin, in words or substance, isn't that so? A. Well, with so much going on, I can't be sure what they said.

Q. Well, I'm not asking you about the exact language. Mr. Hayman, isn't it a fact that they said they would prosecute you unless you helped them with Mishkin? Isn't that correct? A. They urged my cooperation.

Q. Yes. And they told you, in words or substance, did they not, that if you do not—Look at me, please— A. Yes, sir.

1158

Q. —that if you do not cooperate, you would be prosecuted in connection with the possession of certain pornographic pictures which were found in your place of business, isn't that so? A. That they informed me that I was liable to prosecution for same?

Q. Yes. And then they said they would prosecute you unless you testified for them against Mishkin, isn't that right? A. They urged me to cooperate with them.

Q. Well, you understood, did you not, that you would be prosecuted if you did not cooperate with them? A. It seemed wise at the time to cooperate with them.

Q. All right. It seemed wise at the time to cooperate. Now, then you went to the district attorney's office, is that correct? A. Subsequently, I did.

Q. And you were asked a lot of questions? A. Yes, sir.

Q. Now, you weren't very particular, and you 1160
are not very particular now, are you, about the exact truth in answer to those questions, so long as you were helping the prosecution, isn't that correct?

Mr. Stein: Objection.

Mr. Kern: Now, this is a question, Your Honor.

Mr. Stein: I will withdraw the objection.

Justice Breslin: Yes. Repeat that question, please, Mr. Stenographer.

Court Reporter: Question: "Now, you weren't very particular, and you are not 1161
very particular now, are you, about the exact truth in answer to those questions, so long as you were helping the prosecution, isn't that correct?"

Justice Breslin: The question is bad in form.

Mr. Kern: I will withdraw it.

Justice Breslin: Yes.

Q. Mr. Hayman, well, discussing this particular book here, "Dangerous Years",— A. Yes, sir.

Q. —which you say you printed—

Justice Gassman: 32.

Q. —this is Exhibit—

Justice Gassman: 32.
Justice Galloway: 32.

Q. —32—

Justice Galloway: That's right.

Q. —on the flyleaf here you see the printed
1163 words, "Copyright 1955". Do you see that? A. Yes, sir.

Q. Mr. Hayman, isn't it a fact that this book was printed in 1955 or 1956? Isn't that a fact now? A. Yes, sir.

Q. And when you said it was printed in 1959 you were mistaken, is that correct? A. I did a printing at that time for Mr. Mishkin.

Justice Gassman: What time?
The Witness: About March, 1959.

Q. Of this book?

1164 Justice Galloway: Did you print that book?
The Witness: This book has been previously printed, yes.
Justice Galloway: But did you reprint it in 1959?
The Witness: I believe I did.

Q. Well, you are not sure, are you, Mr. Hayman, to be perfectly truthful?

Justice Breslin: Did you do the original printing back in 1955, or did you print that book at any time prior to 1959?
The Witness: Yes, I did.

Justice Breslin: What?

The Witness: Yes, I did.

Justice Breslin: For whom?

The Witness: Mr. Mishkin.

Justice Breslin: Well, when did you first print it for him?

The Witness: Probably back around this time.

Justice Breslin: Around what time, sir?

The Witness: In 1955, '56.

Q. Anybody tell you to say you printed that book in 1959?—some policeman perhaps? A. 1166
No.

Q. Are you sure about that, Mr. Hayman? A. Quite sure.

Q. Are you sure that no policeman—no person ever told you to say that you printed that in 1959? A. I was not told to say that, sir.

Justice Gassman: I couldn't hear you.

The Witness: I was not told to say that.

Q. You just made a mistake, is that right? A. (No answer.)

Justice Galloway: Well, Mr. Hayman, did you 1167
print this book in 1959 as well as in '55 or '56?

The Witness: Yes, sir.

Justice Breslin: This is last year we are talking about, a year and a half ago, did you print it then?

The Witness: I believe it was about that time.

Q. Well, Mr. Hayman, I don't want to prolong this, and I am not going to, except to ask you just once more: Isn't it a fact, Mr. Hayman, that you don't remember printing this book for anybody after the year 1955? Isn't that a fact? A. The original date I gave was before the

Grand Jury. It was an approximate date. And, as a matter of fact, a week ago, when I was at the district attorney's office I asked him to refresh my memory concerning the dates of this —dating of this book, and he quoted from the sheet which—which I testified before the Grand Jury as having been about that time, the date I originally gave.

Q. Around 1959? A. (Witness nods affirmatively.)

1169 Q. But you are not sure now whether you meant 1959 or 1955, isn't that correct? A. Oh, there would be a difference there.

Q. Well, are you sure now whether it was 1955 or 1959? A. I would say it is closer to 1959.

Q. Closer to 1959. Well, the fact is you don't know when you printed that book, isn't that right, Mr. Hayman? A. I would say it was about a year and a half ago.

Q. But you didn't print it in 1955 at all, did you? A. I probably printed it about the first time probably—about 1956.

Q. You probably did? You don't remember,
1170 do you? A. When I saw the plates the first time, they were pretty well worn.

Q. All right, sir.

Justice Breslin: All right.

Mr. Stein: Just wait just a minute.

*Re-direct Examination by Mr. Stein:*

Q. Mr. Hayman, you testified before the Grand Jury, is that correct? A. Yes, sir.

Q. You were in my office several days ago, is that correct? A. Yes.

Q. I asked you when you printed two books, is that correct? A. Yes.

Q. Did you give me an answer? A. I thought it was about 1959, and I asked you to refresh my memory as to what I testified before the Grand Jury several months ago.

Q. As to the same thing you told me in my office, is that correct? A. Yes.

Q. And I said, "Yes. You had," is that correct? A. Yes.

Q. Now, Mr. Hayman, the question has come up as to whether or not certain police officers 1172
suggested that you testify that you printed these two books, Exhibits 31 and 32, in March of 1959, is that correct? A. Would you repeat that, sir?

Q. Mr. Kern asked you whether certain police officers urged you to testify that you didn't print these books in '55 but that you printed them in '59, is that right? A. There was no urging, sir. You just simply refreshed my memory.

Q. This is what Mr. Kern asked you, "Did police officers come to you and say, 'You better testify that you printed those books in '59'." That's what he asked you, right? A. No, there's 1173
no such conversation as that.

Q. No. But Mr. Kern asked you if there was, is that right? A. Yes, sir.

Q. Now, Mr. Hayman, do you remember the first time you saw me before testifying before the Grand Jury about six months ago? A. Yes, sir.

Q. How many books did I ask you about?

Mr. Kern: Oh, I object to this. I don't think this is proper re-direct examination.

Justice Breslin: I don't think it is, either, Sustained.

Q. May I ask this question?—Did I ask you, sir, and did you tell me—did you tell me about a great quantity of books that were printed prior to '58?

Mr. Kern: I object to that.

Justice Breslin: Sustained.

Q. Mr. Haymen, you were given plates for these two books, is that correct? A. Yes, sir.

Mr. Kern: I object to that. It is rep-
1175 etitious.

Justice Breslin: Yes.

Mr. Kern: He's answered it.

Mr. Stein: Well, Mr. Kern has raised the point to two separate printings. I think the answer is fairly obvious, but the witness has become a little confused by his answer.

Justice Breslin: No, no, the witness hasn't indicated that. The witness testified that on each occasion when he printed these books, Exhibits—

Mr. Stein: 31 and 2.

1176 Justice Breslin: —31 and 32, that plates were given to him on each of those occasions and they were left at the defendant's place of business in his name—in the witness' name, in that book store on 42nd Street.

Q. Mr. Hayman—

Justice Gassman: Pardon me a moment. Let me just ask you one question.

The Witness: Sir?

Justice Gassman: Did any police officer, police detective, police inspector, or any assistant

district attorney suggest to you the date of—the year 1959?

The Witness: They only reminded me what I testified before the Grand Jury.

Justice Gassman: Look, just answer me "yes" or "no".

The Witness: No, they didn't suggest—

Justice Gassman: You seem to be evading the question. Did anybody suggest to you to testify that you printed these two books, 31 and 32, in 1959?

1178

The Witness: If you—

Justice Gassman: Now, "yes" or "no"?

The Witness: If you mean coercion, I say no.

Justice Gassman: What do you mean "coercion"? Did anybody hint to you—

The Witness: No, sir.

Justice Gassman: —'59?

Q. One further question. Mr. Hayman, is there any question in your mind that you printed those two books at the request of Mr. Mishkin? A. No, sir.

1179

Q. Is there any question in your mind that at one time, approximately a year and a half ago, you printed those two books before you now for Mr. Mishkin? A. It is about a year and a half, yes.

Q. You are sure of that, aren't you?—or are you? A. It seems reasonable, a year and a half.

Q. Are you sure or not? A. If I gave you an exact day and date, I might be wrong. I would say it is about a year and a half ago.

Mr. Stein: Fine. That's all.

1180 *People's Witness, Paul Hayman, Re-cross*

*Re-cross Examination by Mr. Kern:*

Q. Didn't someone say, "You got to bring this in within two years—within the last two years," something like that? A. I was asked during one of the—

Justice Gassman: Can't you answer "yes" or "no"?

A. Will you—?

Q. Did someone say, "You got to bring it in
1181 within the last two years—two years"? A. Er, no, they didn't put it that way. They simply asked—

Q. How did they put it? A. "What have you printed within the past two years?"

Mr. Kern: That's all.

A. They didn't—

Mr. Stein: Your Honor, I am going to ask whether I can ask, and have an answer to, the question originally asked, because Mr. Kern is making an issue of
1182 whether or not any law enforcement authorities have made suggestions to this witness as to dates he can testify to.

Justice Galloway: He said, "No."

Justice Breslin: He said, "No." What do you want to do, break him down on that?

Mr. Stein: All right. No further questions.

Justice Breslin: Step down.

HYMAN ROSEN, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: Be seated. Keep your voice up. What is your name?

The Witness: Hyman Rosen, R-o-s-e-n.

Court Officer: Where do you live?

The Witness: 1370 Sixth Avenue, New York City.

Court Officer: What is your business or occupation? 1184

The Witness: A writer.

Justice Gassman: A writer?

The Witness: Yes, sir.

*Direct Examination by Mr. Stein:*

Q. Mr. Rosen, what kind of writing do you do? A. Well, I have done fiction, journalism, book reviews for the "New York Times", articles, travel articles.

Q. And approximately how long have you been a writer, sir? A. I would say about 20 years.

Q. About 20 years. Have you had anything published recently? A. Yes. I had a—a travel 1185 book published two years ago.

Q. You also write poetry? A. Yes.

Q. Do you know the defendant in this case? A. Yes.

Q. Approximately how long do you know him? A. I believe I met him in 1954, in the Fall.

Q. Did you ever do any work for him? A. Yes.

Q. What kind of work? A. Er, I wrote several little booklets for him and his former partner.

Q. I show you People's Exhibit 24, a book entitled "I'll Try Anything Twice". I ask you if you can identify that book? A. Yes.

Q. What is that, sir? A. "I'll Try Anything Twice", with a signature "John Thomas", which is a pseudonym I used.

Q. What else can you tell us about that book?

Mr. Kern: I object to the question, "What else—".

Justice Breslin: Yes.

Justice Galloway: Did you write that book?

Justice Breslin: Sustained.

1187 The Witness: Yes, I did.

Justice Galloway: Whom did you write it for?

The Witness: For Mr. Mishkin.

Q. When? A. In 1957.

Q. Who requested you to write it? A. I came to see Mr. Mishkin and asked him if he wanted a book. He said, "What have you got?" I said, "I have a little novel at home." He said, "Well, spice it up and bring it in." That's exactly what I did.

Q. Now, you said you wrote this for Mr. Mish-
1188 kin in the year 1957, is that correct, sir? A. Yes.

Q. The first time you saw me, sir, was approximately a month ago, was it? A. Yes.

Q. At that time, did I, or anyone, ask you to testify that you had written that book in '58? Did I ever make that suggestion? A. No.

Q. I asked you when you wrote it, is that right? A. Yes.

Q. Did anyone else make that suggestion to you, any police officers?

Mr. Kern: There's no issue as to that. I object to this.

Justice Breslin: No. Sustained.

How much were you paid for writing that?

The Witness: I am not quite sure. It is either a hundred or two hundred dollars.

Q. Where were you paid for it? A. In this —his store on 42nd Street.

Q. What's the name of that store, sir? A. Outlet.

Mr. Kern: Well, may I—he says, "In 1190
his store". Well, I will question him about it.

Justice Gassman: Who paid you?

The Witness: Mr. Mishkin.

Q. Personally, sir? A. Yes.

Q. Check or cash? A. Cash.

Justice Gassman: Cash?

The Witness: Yes, sir.

Q. Sir,—

Justice Breslin: Where is that exhibit? 1191
May I have it?

Justice Galloway: 24.

Justice Breslin: 24. (Requested exhibit handed to His Honor.)

Q. I show you two additional exhibits, People's Exhibits 35 and 36—also, Exhibit Number 65, which is an additional copy of 36. Can you identify these books, sir?—books entitled "The French Girl on the Stairs, Parts 1 and 2". A. Yes, I identify them.

Q. Did you write them, sir? A. Yes, I did.

Q. Approximately when? A. Er, this book was written in about 1954.

Justice Gassman: You are speaking about "this book". There are two books there.

The Witness: There are two books, but they are actually one. They should be one. These were just prefaced in two parts. It is one volume.

Q. You wrote it as one book, sir? A. Yes.

Justice Gassman: When?

The Witness: I wrote it in 1954.

1193 Q. For whom, sir? A. I was doing it for myself for a publisher.

Q. Did you sell it to anyone? A. No, I did not, until—

Q. At any time? A. I finally sold it to Mr. Mishkin.

Q. About when was that, sir? A. I think September 3, 1957.

Q. 1957, is that correct? A. Yes.

Q. And where did you sell it to him at? A. At his book shop, the Outlet, on West 47th Street—42nd Street.

Q. Would that be the Publishers' Outlet, sir?

1194 A. Yes, sir.

Justice Gassman: One moment, Mr. Stein. We sort of skipped.

You sold it to the defendant December of what year?

The Witness: 1957.

Justice Gassman: What did you receive for it?

The Witness: $400.00.

Justice Gassman: $400.00 for both books?

The Witness: Yes, please.

Justice Gassman: Who paid you?

The Witness: Mr. Mishkin.

Justice Gassman: Where?

The Witness: In the Publishers' Outlet on West 42nd Street.

Justice Gassman: Were you paid by check or cash?

The Witness: By cash.

Q. The name "Colin Ross" appears as the author of these two books, sir. Is that a pseudonym of yours? A. That's a pseudonym of mine.

Q. Do you have any other pseudonym that 1196
you use? A. I have got about five that I use.

Q. Is one of them Harry Rosholenko? A. Yes.

Q. Is that the one you are currently writing under? A. Yes, I do; and I use Colin Ross, too.

Mr. Stein: I ask that this document be marked People's Exhibit 74 for identification.

Justice Breslin: All right. 74 for identification. Mark it. (So marked.)

Q. I show you People's Exhibit 74 for identification, sir; and I ask you whether you can identify it? A. Yes. This is a contract drawn 1197
up—

Justice Breslin: Don't. Just can you identify it?

The Witness: Yes, I do.

Q. What is it, sir? A. It is a contract drawn up between Mister—

Justice Breslin: Wait a minute.

A. —Mr. Mishkin and myself.

Justice Breslin: Wait a minute.

1198

Mr. Kern: Objected to.

Justice Breslin: It is not in evidence. Objection sustained.

Q. Well, at one time, sir, did you enter into a contract with Mr. Mishkin for the sale to handle the two books which you just testified about, "French Girl on the Stairs, Parts 1 and 2"? A. I did.

Q. And is that the contract,—

Mr. Kern: No.

1199

A. That's the contract.

Q. —People's—

Mr. Kern: All right. Go ahead.

Q. —Exhibit—

Justice Breslin: All right. Go on.

Q. I show you People's Exhibit 74 for identification. Can you identify this? A. I do, sir.

Q. What is it?

Mr. Kern: Now, I object to that.

1200

Justice Breslin: Is that the contract—

The Witness: The contract.

Justice Breslin: You say you signed a contract?

The Witness: I signed that contract.

Justice Breslin: Did he sign it?

The Witness: Yes. His signature is there as well as mine.

Justice Breslin: And you have the paper before you—

The Witness: Yes.

Justice Breslin: —that was signed at that time?

The Witness: That's right.

Justice Breslin: When was it signed, the contract?

The Witness: September 3, 1957.

Justice Breslin: All right. Now, are you offering it?

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Received, People's Exhibit 74. (So marked.)

Mr. Stein: Now, may the record reflect that People's Exhibit 74 bears the 1202 signature Harry Rosholenko and Edward Mishkin on it.

Q. Did Edward Mishkin sign this in your presence, sir? A. He did.

Justice Gassman: May I have it, please. (Exhibit handed to His Honor.)

Q. After you appeared in my office, sir, the first time, did you have cause to telephone Mr. Mishkin? A. Yes, I did.

Q. Did you have a phone conversation with him? A. I did. 1203

Q. What did he say to you, sir?

Mr. Kern: Oh, I object to this.

Justice Galloway: I don't know when the phone conversation took place.

Justice Breslin: Yes. Sustained.

Q. When did you call him, sir? A. I called him several days—actually the one evening after I had been to your office.

Q. And you were in my—

Justice Breslin: When was that?

Justice Galloway: We don't know when you were there.

The Witness: Roughly, two and a half weeks ago.

Mr. Stein: I will tell you right now, Your Honor.

Q. Were you in my office on October 11th of this year? A. I was.

Q. And several days after that, you state, you called the defendant, is that right? A. I did.

1205 Q. And did you have a conversation with him? A. Yes.

Q. And did the conversation concern—

Mr. Kern: I object to what the conversation concerned.

Justice Breslin: Yes. Sustained.

Q. Will you tell us what the nature of the con—Did you discuss the case with him? A. I did.

Mr. Stein: Do you have an objection, Mr. Kern?

1206 Mr. Kern: Not yet.

Justice Breslin: All right. Go ahead.

Q. Will you tell us what the defendant said? A. I said—

Mr. Kern: I object to it. Just a moment.

Mr. Stein: I would prefer Your Honor to ask—

Justice Breslin: Wait a minute.

Mr. Stein: I am sorry.

Justice Breslin: Objection overruled.

Mr. Kern: Exception.

Q. What was the conversation? A. I told Mr. Mishkin that I had been subpoenaed to appear at this court on the 24th and I wanted to know who had given my name, and he said he didn't know. And I said, "Well, I have—I am going to be very frank about what took place." He said, "Go ahead. Tell the truth. Don't perjure yourself."

Q. Did he say anything else that you recall? A. Not of any substance. I merely asked him how he was. 1208

Q. You don't recall anything else of any substance? A. No. This is the substance.

Q. Do you recall whether the defendant suggested to you the person who may have turned your name over to the district attorney?

Mr. Kern: Now, I object to this.

Justice Breslin: Sustained.

Mr. Stein: No further questions. You may inquire.

*Cross Examination by Mr. Kern:*

Q. Mr. Colin—Mr. Colin Ross—that's the name you use, is that correct? A. Yes. 1209

Justice Galloway: Is it Ross or Rosen?

The Witness: That's a pseudonym. Rosen is the real name.

Justice Galloway: That's what I thought —Rosen.

Q. Now, Mr. Rosen, the first book you say you delivered to the defendant or wrote for the defendant was "I'll Try Anything Twice"? A. No, that's not the first. There were others before that, but that was the—apparently that's the one under issue.

Q. And then "French Girl on the Stairs"? A. "—on the Stairs", yes.

Q. Now, you are a writer by profession? A. Yes.

Q. You studied literature, journalism, is that correct? A. Yes.

Q. You are familiar with contemporary literature? A. Yes.

Q. You are familiar with 19th Century literature, is that right? A. Yes.

Q. You are familiar with books like De-
1211 Maupassant's "Scarlet Letter",— A. Yes.

Q. —and more modern period, contemporary writing like "Lady Chatterly's Lover"? A. Yes.

Q. Now, these two books to which you referred, "I'll Try Anything Twice" and "French Girl on the Stairs", how long have you been writing, by the way? Withdrawn. A. Twenty years.

Q. Twenty years? A. (Witness nods affirmatively.)

Q. And you have written a great many books? A. Yes.

Q. And you are currently engaged in writing,
1212 aren't you? A. Yes.

Q. And you have read all of the contemporary and 19th Century literature? A. A certain amount.

Q. Yes. Well, can you tell the Court whether, in your opinion, "I'll Try Anything Twice" is pornographic? A. I wouldn't say it was pornographic. My impression—I would not be capable of writing pornography.

Q. Yes. A. I mean I would have a moral objection to it. When I was apprised by the—Mr. Stein that it was pornographic, I was shocked. I said, from my own point of view, that I found no four-letter words of the occasional

kind included, but I found—I said it think it is titillating; and I don't think titillation is essentially pornography.

Q. You express that opinion, do you not, in the light of modern interpretation—or, as we may say in the courts, the interpretation of this so-called literature in light of contemporary community standards? A. Yes.

Q. And you express your opinion based upon what I have just said, isn't that correct? A. Yes. 1214

Q. And your opinion, likewise, goes to "The French Girl on the Stairs"?—

Mr. Stein: Objection.

Q. —or does it?

Mr. Stein: There is no allegation—

Justice Breslin: Yes. Sustained.

Mr. Stein: —in the information that "French Girl on the Stairs" is pornographic.

Q. Well, you wrote "French Girl on the Stairs", did you not? A. Yes, I did. 1215

Q. Would you say, as an expert—as a writer on this particular subject, that that is pornographic? A. Hardly.

Mr. Stein: Objection. We do not allege that it is pornographic.

Justice Breslin: Well, he may ask. Overruled. Is it?

The Witness: It's not.

Q. Now, Mr. Rosen, have you read any of these books which have been received by this Court in evidence? A. I can't read them. I find them awfully dull.

1216 *People's Witness, Hyman Rosen, Re-cross*

Q. Well, have you read them? A. No. I don't read this sort of literature.

Q. To you it is dull, is that correct? A. Stupid.

Q. It doesn't titillate you, does it? A. I don't find it essential to read it. I don't find it literature. I don't find that it creates any value of any sort.

Mr. Kern: I see. All right. That is all.

1217 Mr. Stein: Oh, there is one question I had.

*Re-direct Examination by Mr. Stein:*

Q. You testified earlier, did you not, that Mr. Mishkin asked you to spice up "I'll Try Anything Twice"? A. He used the phrase, "Spice it up."

Q. And you find nothing of any value in the other types of books to which Mr. Kern referred? A. It is not literature to me.

Q. Do you find anything socially redeeming
1218 important in any of these books? A. I haven't read them.

*Re-cross Examination by Mr. Kern:*

Q. You are writing now for the moving-picture people out West? A. Some, yes.

Q. You spice up your stories in order to fit contemporary needs, isn't that so? A. I think it is an ingredient that you put in.

Q. That's it. A. If you have a serious story, apparently, to lighten the—you know—the—

Q. When Mr. Mishkin asked you to spice it up, you didn't interpret that as meaning make it

pornographic of salacious? A. Well, I don't think the word "spice" means pornography.

Q. Just a little interest,— A. That's right.

Q. —a little love interest, perhaps? A. That's right.

Justice Galloway: Mr. Rosen, "French Girl on the Stairs" you consider literature, I assume?

The Witness: That's a serious book.

Justice Galloway: That's what I thought.

The Witness: Outside of the pictures. 1220

Justice Galloway: Yes. All right.

Mr. Kern: That's all.

Mr. Stein: Okay. Thank you.

The Witness: Thank you.

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LEOTHA HACKSHAW, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: Be seated. What is your name? 1221

The Witness: Leotha Hackshaw.

Court Officer: Keep your voice up. What is your name?

Justice Gassman: I can't hear you.

The Witness: L-e-o-t-h-a H-a-c-k-s-h-a-w.

Justice Gassman: How do you spell your second name?

The Witness: H-a-c-k-s-h-a-w.

Court Officer: Your home address?

The Witness: 92 Pryor Place.

Court Officer: Where is that?

The Witness: Yonkers.

Court Officer: And your business or occupation?

The Witness: Writer.

Court Officer: Writer. Keep your voice up.

*Direct Examination by Mr. Stein:*

Q. Miss Hackshaw, I will ask you to please try to speak so that I can hear you at the point I am standing at now. A. Surely.

Q. Miss Hackshaw, what kind of writing do you do? A. I write novels, pocketbook novels,
1223 television scripts.

Q. And are you currently doing some writing? A. Yes.

Q. Have you attended any schools of higher education? A. Yes.

Q. What schools are they? A. New York University.

Q. And did you attend any other school after that? A. Courses at Columbia.

Q. Graduate courses, is that correct? A. Yes.

Q. In writing? A. Yes.

Q. Or English? A. Yes.

Q. Do you know the defendant in this case?
1224 A. Yes.

Q. Approximately how long ago did you first meet him? A. About three or four years, I would say.

Justice Gassman: Would you mind raising your voice? We got to hear you.

The Witness: About three or four years.

Q. Miss Hackshaw, I show you People's Exhibit 26, a book entitled "Catanis". I ask you whether you can indentify this book? A. Yes.

Q. What is it? What can you tell us about it?
A. I wrote it.
Q. For whom?

Justice Gassman: You wrote it?
The Witness: Yes.

Q. For whom? A. For the defendant.
Q. Mr. Mishkin? A. Yes.
Q. Approximately when? A. Oh, around 1958, '59.
Q. Do you recall a little more precisely approximately when you wrote it? A. I think 1226
around the Fall of '57.
Q. About the Fall of '57? A. Yes.
Q. Did anyone ever tell you to say '58? A. No.

Mr. Kern: I object to this.
Justice Breslin: Sustained.
Mr. Stein: I am sorry. I will withdraw the question.

Q. Can you tell us something about the circumstances under which you came to write this book? 1227

Mr. Kern: I object to that. I object to the form of the question. The question is improper.
Justice Breslin: Sustained.
Mr. Stein: Question withdrawn.

Q. Did you have a discussion with Mr. Mishkin prior to writing this book concerning the writing of the book? A. This book?
Q. Yes. A. Yes, I did.
Q. Would you tell us what that conversation was, as well as you remember it?

Justice Gassman: When?

Q. And when it took place, and where? A. Well, I met Mr. Mishkin through another writer, and he—we talked about writing.

Q. Well, approximately when? A. The Fall of '57.

Q. Go ahead.

Mr. Kern: Was this before or after the book was written. I think that was—

Mr. Stein: I am asking only about before.

1229 Mr. Kern: Before.

A. It was before the book was written.

Justice Breslin: Yes. Go ahead.

A. He indicated what sort of writing—what sort of book he wanted. Then I went home and wrote it.

Justice Breslin: What did he say to you?

Q. What did he tell you? A. He told me he wanted a book written that was full of sex scenes and lesbian scenes, and that sort of thing.

1230 Q. Did he use any other words that you recall? A. Well, they were sort of naughty.

Justice Breslin: What were they?

Q. Tell us what he said. A. This is a little embarrassing. He wanted a book full of the things that are in the book. It is—

Justice Gassman: Well, now,—

A. —sex.

Justice Gassman: —what did he tell you? The book wasn't written at that time, and he told

you that he wanted something in the book. Now, what did he say to you?

The Witness: Well, he wanted a book in which there were lesbian scenes, the sex had to be very strong, it had to be rough, it had to be clearly spelled out. In other words, I couldn't be subtle about it; I had to write sex very bluntly, make the sex scenes very strong.

Q. Where did you have this conversation with him? A. In the store—42nd Street.

Q. Were you paid for this book? A. Yes, I 1232
was.

Q. By whom? A. Mr. Mishkin.

Q. Personally? A. Yes.

Q. Where? A. In the store.

Justice Breslin: What were the words used? You said there were some words that you described as "naughty" were used. What do you mean by that?

Madam, we have heard all the words; and you have heard them, too, according to your own testimony, from the defendant. I just want you to repeat them. What were they? 1233

The Witness: Well, the sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men.

Justice Breslin: In what way? Did he go into detail?

The Witness: Yes. He described what he wanted and, too, showed me the other books that he had there.

Justice Breslin: What did he say? What did he say?

The Witness: Er, he wanted scenes in which women were making love with women, and that sort of thing.

Justice Galloway: Well, he used more graphic language, I assumed, did he, from what you said earlier? He used naughty words, is that what you said?

Mr. Stein: I believe the witness said he wanted naughty things.

Justice Galloway: I don't know.

Justice Breslin: No, no.

Mr. Stein: I am sorry.

Justice Galloway: What did he say? That's
1235 all we want to know.

The Witness: He brought out books and showed me,—

Justice Galloway: Yes?

The Witness: —that had been written; and he said he wanted sex scenes like these in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men were making love to men, and there was spankings and scenes—sex in an abnormal and irregular fashion.

Justice Galloway: That was, in substance, the
1236 conversation in any event, is that correct?

The Witness: Yes.

Justice Galloway: All right.

Q. How much were you paid for the book, madam? A. Two hundred dollars.

Justice Gassman: Well, before you get to how much you were paid, what did you say to what he said to you?

The Witness: He wanted to know if I could write it.

Justice Gassman: What did you say?

The Witness: I told him I had never written it, and I considered myself a carte blanche and I could write anything if I knew what I was to write.

Justice Gassman: Did you finally tell him you would write that book—

The Witness: Yes.

Justice Gassman: —as outlined by him?

The Witness: Yes.

Justice Gassman: And you were supposed to get how much?

1238

The Witness: Two hundred dollars.

Mr. Stein: I am through with the book now, if Your Honors have any questions.

Justice Galloway: Did you get paid for doing the book?

The Witness: I was paid for that book.

Justice Galloway: How were you paid?

The Witness: Paid me in cash in the store.

Justice Galloway: Where?

The Witness: In the store.

Justice Galloway: Where was the store?

The Witness: On 42nd Street and 8th Avenue.

1239

Justice Breslin: May I see the exhibit?

(Same handed to His Honor.)

Q. Do you recall the name of the store, madam? A. I think it is the Publishers' Outlet.

Q. I show you now People's Exhibit 25 and also 59, which is a second copy of the same book, the book entitled "Masque". I ask you, madam, whether you can identify those copies? A. Yes. It's my book. I wrote it.

Q. You wrote that book, is that right? A. Yes.

1240 Q. Approximately when did you write it, madam? A. Well, this was subsequent to the other.

Q. Subsequent to the first one?— A. Yes.

Q. —"Catanis"? A. It was around '58. I don't recall the exact month.

Q. Do you recall approximately when in '58 you wrote it—early, late, middle of '58? Do you recall at all? A. I should imagine it would be about a year or so later, nine or ten, twelve
1241 months after the first one.

Q. Well, what part of '58 would that make it? A. The Fall. The Fall of '58.

Q. About the Fall of '58? A. Yes.

Q. Are you sure? A. I'm as close to being sure as I can possibly remember.

Q. Could it be a little later, madam? A. Yes.

Q. And for whom did you write it, madam? A. For Mr. Mishkin.

Q. At his request? A. Yes.

Q. Would you tell us, did you have conversations with him concerning the writing of that book, "Masque"? A. Well, always, I asked what
1242 he wanted. Otherwise, I would not have written it.

Q. Did you have a conversation concerning this specific book? A. Yes. He indicated he wanted something with— In this book he wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong.

Q. He told you that, is that right, madam? A. Yes.

Q. Approximately when did you speak to him about the writing of this book? A. Well, it was in '58, before the book was writen,—

Q. And was it subsequent to the time— A. —so it would be a few months—

Q. Go ahead. I am sorry. A. It would be a short while before the book was written, so that it was written in the Fall. It would be late Summer.

Q. And it would have been subsequent to the time you completed "Catanis", is that correct? 1244
A. Yes.

Q. Do you recall whether this book "Masque" immediately followed "Catanis", or were there any books— A. Beg your pardon?

Q. Did you write "Masque" immediately after "Catanis", or did any books intervene? A. It wasn't immediately after. I didn't write regularly. I didn't do that much writing for him, so it could not have been immediately.

Justice Galloway: As a matter of fact, didn't you: Was "Masque" the next book you wrote for nine months later?
1245
The Witness: Yes.

Justice Galloway: All right.

Q. My question—Let me put this question to you: Was "Maque" the next book you wrote for the defendant after "Catanis"? A. I believe so.

Justice Breslin: What name did you use?

The Witness: Shaw Lee. Shaw Lee.

Justice Breslin: Do you always use that name?

The Witness: For him. When I wrote these books for him this is the name I used.

Justice Breslin: Just for these books, is that right?

The Witness: I only done these books for him,—

Justice Breslin: Pardon?

The Witness: —and this was the name that was used in all the books that I wrote for him—Shaw Lee.

Justice Breslin: Well, did you use that name in writing any other pieces of literature—

1247 The Witness: No.

Justice Breslin: —or any other book?

The Witness: No.

Justice Gassman: Tell me this: You testified before that when he spoke to you originally about writing the book "Catanis" you told him that you had never written anything like it.

The Witness: That's right.

Justice Gassman: Well, you subsequently wrote the book. Did you do any research on material—

The Witness: Yes.

Justice Gassman: —which was to be used in

1248 the book?

The Witness: Yes, I did.

Justice Gassman: Where did you do your research?

The Witness: I did my research at home, and I borrowed a few books from him.

Justice Gassman: What was the nature of the research?

The Witness: Oh, I got case histories written by doctors on—one was called "Sexual Anomalies, Compilations of Case Histories of Lesbians".

Justice Gassman: Who was the author of that?

The Witness: One is Capio, I believe.

Justice Gassman: Who?

The Witness: Capio, C-a-p-i-o.

Justice Gassman: Did you use any books written by Doctor Kraft-Ebling?

The Witness: I think I did.

Justice Gassman: Any other?

The Witness: I don't recall. I did quite a bit of reading.

Justice Gassman: And you say you used some of the books that the defendant, himself, gave 1250
you?

The Witness: Yes.

Justice Gassman: Do you know the titles of those books?

The Witness: I think the book by Kraft-Ebling I got from him.

Justice Gassman: Did you get any other books from him, from the defendant?

The Witness: I got other books from him, but I don't recall what they were. I didn't make any note of them. I returned them.

Justice Gassman: How long did it take to do the research? 1251

The Witness: Well, it—research isn't something that would be started and put down, so as long as you are writing you are constantly doing research, so that while I was writing for him I was always reading; and then the books I borrowed from him, I read; and after I read them, I returned them.

Justice Gassman: And how long did it take you to write the books?

The Witness: The first book took me about three months, because I did more research on

that since it was absolutely new. The others didn't take so long. It takes about—it takes me about a month to do one.

Justice Gassman: Two months work involving the research and writing. You say you received two hundred dollars?

The Witness: Yes.

Justice Gassman: Did you do any work for anybody else during those two months?

The Witness: The two months that I was work-
1253 ing on these books?

Justice Gassman: Yes.

The Witness: No, I didn't.

Justice Gassman: I see.

Justice Breslin: Did you know that this particular book that you wrote, People's Exhibit—

Justice Gassman: "Masque". 26.

Justice Breslin: —26 in evidence—

Justice Gassman: No. Wait a minute. No. 25.

Justice Breslin: —25—that this was going to be sold for five dollars a copy?

The Witness: No. I didn't know what the
1254 prices were going to be at the time.

Justice Breslin: You didn't know?

The Witness: I saw it when the book came out. I saw the price on the book on the cover in the store, but at the time I didn't know how much it was going to be sold for.

Justice Breslin: Where did you see them? In what store?

The Witness: In the same store, on 42nd Street, but I had no way of knowing what he was going to sell them for.

Justice Breslin: I see. All right.

Mr. Stein: You may inquire?

*People's Witness, Leotha Hackshaw, Cross* 1255

*Cross Examination by Mr. Kern:*

Q. Miss Hackshaw,—

Justice Breslin: All right.
Mr. Kern: It will be just five minutes.
Justice Breslin: All right.

Q. Miss Hackshaw, you are a lady of considerable education, isn't that right? A. I went to college. I don't know—

Q. You graduated from college? A. Yes. 1256

Q. Got a degree? A. Well, I suppose—I didn't collect my diploma, but I am qualified for a degree, yes.

Q. Are you married? A. No.

Q. Now, you read Kraft-Ebling, did you not? A. Yes.

Q. You also read "Sex Deviation"? A. "Sex Deviation"?

Q. Yes? A. I don't recall.

Q. "Sex Anomalies"? A. "Sex Anomalies", yes.

Q. These are books which you borrowed from the defendant, isn't that so? A. Yes. 1257

Q. These books, you know, have enjoyed distribution throughout the world for many years, isn't that so? A. Yes.

Q. Now, Miss Hackshaw, you have read considerably as to the contemporary literature, haven't you? A. Yes, I have.

Q. And 19th Century literature, as well? A. Yes.

Q. And you have read books which are characterized today as classics,— A. Yes.

Q. —isn't that so? And other books which in the last century were not considered classics, books like "Scarlet Letter,"— A. Yes.

Q. —and perhaps more modern times, books like "Lady Chatterly's Lover"? A. Yes.

Q. You wouldn't write anything—you wouldn't do anything to violate the law, would you, Miss Hackshaw? A. Not knowingly.

Q. Yes. Well, you are familiar with the law which governs the preparation, printing, publish-
1259 ing, distribution of books which are obscene, filthy, and lascivious? You understand that, don't you? A. Would you phrase your question? You say, am I familiar with it?

Q. Yes. You know that there is a law, don't you, Miss Hackshaw? A. I am familiar with it now. I didn't give it a thought before.

Q. Well, when you wrote these books, you were not familiar with any law that condemned the writing of what we sell pornographic literature? A. No, I wasn't familiar with any such law.

Q. You are familiar with it now, aren't you? A. I still am not, because I'm—no, I am not. I
1260 can't say.

Q. Well, Miss Hackshaw, these books which you read, Kraft-Ebling and "Sex Anomalies" and "Sex Deviation" are all concerned with conditions which are widespread throughout the world, isn't that so, as to sexual behavior of man and woman? A. That's right.

Q. You don't consider that pornographic, do you? A. No.

Q. And nothing that Kraft-Ebling wrote, and nothing in that book—or the other books which I mentioned, can be considered as pornographic? A. I wouldn't consider them so.

Q. And Miss Hackshaw, there are no four-letter words in these books that you wrote, are there? A. Frankly, I can't remember what was in the books now. It's been quite a while.

Q. Well, you wrote the books, didn't you? A. Surely.

Q. And you wouldn't remember whether there were so-called four-letter words in them? A. No, I wouldn't remember. I wouldn't remember.

Q. Do you think there are? A. I don't know what's in them very frankly. They were written 1262 quite a while ago, and I am not—

Q. Well, these books were based upon what you read in these—these authoritative volumes, isn't that correct? A. Yes, plus my own imagination.

Q. Yes. Well, you wouldn't say these books are pornographic? A. I don't know that I qualify to make such a definition as to what's pornographic or not.

Q. All right.

Justice Gassman: Tell me this: As a writer, I assume that when you write something it is 1263 intended to convey some sort of a message to the reader?

The Witness: It is meant to entertain and to interest.

Justice Gassman: Now, can you tell me what message, in your opinion, could be conveyed to the reader by such a book as "Catanis" or "Masque"?

The Witness: I had no message. As I said, when I write I have no message. I am not a sociological writer interested in serious writing. I belong to the school of writing which writes to

entertain, to tell a story; and every book that I have written, including these, have a good story to tell, and that is all that I sought to do.

Justice Gassman: Well, do you think there is anything in either of these two books that is entertaining in any way to the normal human being—

The Witness: I don't—

Justice Gassman: —even in contemporary times?

1265 Mr. Kern: Well, now, Your Honor, I hate to—

Justice Gassman: All right. I withdraw the question.

Mr. Kern: The word "normal"—

Justice Gassman: I withdraw the question.

Justice Breslin: You say they have a good story to tell. What is the good story to tell in "Masque"?

The Witness: Well, the first—May I look at—May I look at the book?

1266 Justice Breslin: Sure.

The Witness: I would like to remember exactly.

(Requested book handed to the witness.)

The Witness: First of all, "Masque" is not the title under which I wrote the book. I do not recall the title. These titles are all changed after the books have been written. The publishers usually change the titles. As I recall the story, from glancing through it, it was meant to tell the story of people living in a hotel, a group of people; and I had in mind a story like "Grand

Hotel" when I was writing this; and that is the story. It is just the activities of a group of people living in a hotel together.

Justice Breslin: By the way, have you written any other books?

The Witness: Yes.

Justice Breslin: They have been published, I presume?

The Witness: Yes.

Justice Breslin: What name did you use?

The Witness: I have two books on the stands 1268
now under the name of Lee Morrel.

Justice Breslin: Lee Morrel?

The Witness: Yes.

Justice Gassman: What are the titles of the books you wrote under that name?

The Witness: One is called "Mimi".

Justice Gassman: I beg your pardon?

The Witness: "Mimi", M-i-m-i.

Justice Breslin: Do you use any other pen name other than the names you mentioned?

The Witness: These are the only pen names. When I write serious things like television scripts 1269
I use my own name.

Justice Breslin: Did you have any particular reason for using this fictitious name in writing these two books?

The Witness: No. It was just something that came out of the blue. It was the initials—The "Lee" was the first initials of my first name, and the "Shaw" the last initials of my last name.

Justice Breslin: All right.

Q. Well, "Mimi" is a book about lesbian activities, isn't it, and— A. No, it isn't.

Q. —relationship between men and women? A. No.

Q. And about a message,—well, you might write a book which is not considered a work of fiction where you can set forth facts or opinions such as are contained in these books which we referred to? Books are written about facts, isn't that so? A. Of course. Of course.

Q. And your idea was to educate the public as to practices which we hear about among men
1271 and women—between men and women, isn't that so? A. My idea in writing—and I think every writer has this—is to write about life as it exists.

Q. Life as it exists? A. Yes.

Q. That's correct. And these books concern life as it exists between men and women—sex life, and anything else, isn't that correct? A. As I have seen—read it in the books.

Q. Yes.

Justice Galloway: You really wanted to tell a story about the hotel in the book "Masque"?

1272 The Witness: In the story of "Masque" I wanted to tell the story about a hotel, the group of people living in a hotel.

Mr. Kern: That's all.

Mr. Stein: Thank you. That's all.

Justice Breslin: Two-ten.

(Luncheon recess.)

*People's Witness, Kenneth Johnson, Direct* 1273

Mr. Stein: Kenneth Johnson.

KENNETH JOHNSON, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: All right. Be seated. What is your name?

The Witness: Kenneth Johnson.

Court Officer: Your home address?

The Witness: 100 Morningside Drive.

Court Officer: Manhattan? 1274

The Witness: New York City.

Court Officer: Business or occupation?

The Witness: I am a writer.

Court Officer: Keep your voice up.

Justice Gassman: Kenneth Johnson?

The Witness: Yes, sir.

*Direct Examination by Mr. Stein:*

Q. Mr. Johnson, I will ask that you keep your voice up so that I can hear you at the place I am standing at now. A. Yes, sir.

Q. Mr. Johnson, what kind of writing do you do? A. I write fiction, sir. 1275

Q. And for how long have you been a writer? A. The last ten years.

Q. Are you writing anything at the current time? A. Yes, I am.

Q. What are you writing? A. I am writing novels and short stories that I submit to publications and various magazines and publishers.

Q. Has anything recently been accepted? A. Yes, sir.

Q. What is that? A. In March I sold a story to Foster Publications for five hundred dollars.

Q. Foster Publications? A. Yes, sir.

Q. Now, sir, have you attended any schools of higher education? A. Yes, sir, I have.

Q. What schools are those? A. I attended Pittsburgh, Kansas—Kansas State Teachers College. I received my baccalaureate degree from Langston University in Langston, Oklahoma. And I received my master of arts degree from Wichita University in Wichita, Kansas.

Q. Master of arts in what? A. I majored in
1277 English and Modern Languages.

Q. Were you in the service at all? A. Yes, sir, I have been.

Q. Approximately when was that? A. I entered the service of the United States Coast Guard on February 13, 1941. I stayed in the Coast Guard until June 26, 1943. I entered the army on August 10 of 1943. I was discharged on August 30 of 1946.

Q. And where did you see service? A. I saw service in the ETO.

Mr. Kern: I object to this. I really
1278 don't think this is necessary.

Justice Breslin: All right. Well,—

Mr. Stein: This was the last question I had.

Justice Breslin: All right. Answer the question. Where did you see service?

The Witness: I saw service in the ETO.

Q. Now, Mr. Johnson, do you know the defendant in this case? A. Yes, sir, I do.

Q. Approximately how long ago did you first meet him? A. I met him in 1955, in March or April of 1955.

Q. Have you ever done anything for the defendant? A. Yes, sir, I have?

Q. What? A. I have written books for him.

Q. Now, Mr. Johnson, I ask you to look at People's Exhibit 1— Well, will you look at People's Exhibit 1, please, a book entitled "Chances Go Around". Can you identify that book, sir? A. Yes, sir, I can.

Q. What is it? A. It is a book that I wrote for Mr. Mishkin.

Q. Approximately when did you write it, sir? 1280
A. I wrote it in 1958—September, I think, 1958, for which I received thirty-seven dollars.

Q. And who paid you for it, sir? A. Mr. Mishkin.

Q. Where did he pay you? A. He paid me at the Main Stem Book store on 49th Street and Broadway.

Q. And at whose request did you write this book, sir? A. I wrote it at Mr. Mishkin's request.

Q. Mr. Johnson, I show you People's Exhibit 2, a book entitled "Impact". Can you identify that book? A. Yes, sir, I can. 1281

Q. What is that, sir? A. This was a book that I wrote for Mr. Mishkin.

Q. Approximately when, sir? A. I wrote it between March and May in 1958.

Q. And were you paid for it? A. Yes, sir, I was.

Q. By whom? A. By Mr. Mishkin.

Q. In what form? A. Two hundred dollars in cash.

Q. Where did he pay you, sir? A. He paid me at 254 West one hundred and—West 42nd Street.

Q. And you wrote it pursuant to his request, sir? A. Sir?

Q. Did you write it pursuant to his request? A. Pursuant to his request, yes. This is one of four books that I wrote for Mr. Mishkin under these circumstances: Mr. Mishkin approached me and said to me that, "Justin, I want you to write four books."

Q. Mr. Johnson, you mentioned the name "Justin". What is that? A. My writing name. One
1283 of my writing names is Justin Kent.

Q. Justin Kent? A. Yes, sir.

Q. Go ahead, sir. A. He said, "I want you to write four books with a strong lesbian theme; and if I am able to sell them, I will give you an additional seven hundred dollars. In the meantime, I will give you two hundred dollars cash for the books."

Q. And this was one of the books which you wrote for him? A. One of the four that I wrote for him in this period of time, yes, sir.

Q. What name appeared as the author of that book, sir? A. Justin Kent, sir.

1284 Q. Would you look at People's Exhibit 1, sir? What name appears as the author of that? A. Art Stan. I don't know who he is sir.

Justice Gassman: What name?

The Witness: Art Stan.

Q. Now, immediately above the name Art Stan there is a black block that obscures letters underneath, is that correct? A. Yes, sir.

Q. Can you read what words are obscured— A. Justin Kent.

Q. —underneath? Justin Kent. Now, do you recall anything particular about the circumstances under which you came to write People's Exhibit 1, sir?

Mr. Kern: Well, now, I object to the form of that question. If Counsel wants a conversation with particular reference to that book, he should ask for it.

Justice Breslin: Yes. I think so. Sustained.

1286

Q. Did you have any conversation with Mr. Mishkin concerning the writing of People's Exhibit 1, sir? A. Mr. Mishkin had spoken to me shortly after I wrote the first books for him about bondage, fetishism.

Q. Approximately when did he have this conversation with you? A. Approximately in November of 1957—

Q. Go ahead. A. —when I first started writing for him. And I went to the public library and did a lot of reading about high heels, about corsets, about bondage, about perfume fetishes; and this book was not written at his specific order but was one that I felt that he would like; and I wrote it for him and turned it over to him.

1287

Justice Galloway: Well, you wrote it to sell it?

The Witness: Yes, sir.

Justice Galloway: If you didn't sell it to him, you would have sold it to someone else?

The Witness: No, sir. I had no other market. Mr. Mishkin had seen to it that I had no other market for that kind of thing.

Justice Gassman: What is the name of this book?

The Witness: "Chances Go Around."

Q. Mr. Johnson, I now show you People's Exhibit 3. Can you identify that? A. Yes, sir, I can.

Q. What is it, sir? A. This is a book based on "The House of Dolls" that I wrote for Mr. Mishkin at his request.

Q. Approximately when, sir? A. In the Sum-
1289 mer of 1958.

Q. Are you sure of that date, sir? A. No, sir, I'm not. This—I'm—I'm—I'm nervous right now.

Q. Well, try to recall.

Justice Galloway: Just a minute, Mr. D.A. I think I ought to clear something up. Mr. Kern, you were consulting with your client.

Mr. Kern: Yes.

Justice Galloway: I asked this witness a question, and I don't think his answer
1290 was responsive, and I don't think you heard it. I will repeat the question.

Mr. Kern: Thank you very much, Your Honor.

Justice Galloway: When you wrote this book you didn't write that specifically at Mr. Mishkin's direction, did you?

The Witness: "Chances Go Around"?

Justice Galloway: Yes.

The Witness: No, sir, I didn't.

Justice Galloway: All right. Now, you also volunteered a statement the first time when I

asked you the question. You would have sold it to someone else if you had the chance, would you not?

The Witness: Yes, sir, but I said I hadn't—

Justice Galloway: All right. Go ahead. Tell us what you said.

The Witness: I said I had no chance to do that. Mr. Mishkin had seen to it that I didn't have any chance.

Mr. Kern: Well, I thank you very much. That obviously is objectionable, and I move to strike 1292
it as not being responsive.

Justice Breslin: Strike it out.

Justice Galloway: All right. I didn't think you heard it.

Mr. Kern: I did not. Thank you very much.

Q. Now, Mr. Johnson, getting back to People's Exhibit 3, would you look at the book and tell us whether you recall the approximate time at which you wrote that? A. This is a book that's based on "House of Dolls".

1293

Justice Gassman: Who wrote "House of Dolls"?

The Witness: I don't know, sir.

Q. When you say "based on 'House of Dolls'", Mr. Kent, what do you mean by that?

Justice Galloway: Mr. D. A., there was a question asked, "When was the book written?" and there was no answer.

Mr. Stein: All right.

Justice Galloway: If he doesn't know, let him say so.

1294 *People's Witness, Kenneth Johnson, Direct*

Q. Do you recall, Mr. Johnson, when you wrote this book? A. No, sir, I don't.

Q. Do you have anything that you can refresh your recollection from? A. Yes, sir I do. The Summer of 1958.

Q. Summer of 1958.

Mr. Kern: May the record note that this witness is looking at a sheet of yellow paper which he holds in his hand.

Justice Breslin: Yes.

1295 Mark that sheet of paper.

Mr. Kern: May I have it marked for identification?

Mr. Stein: Sure.

(Paper marked People's Exhibit 75 for identification.)

Q. Now, Mr. Johnson, summer of 1958 is your present recollection of the date you wrote it for him? A. Yes, sir, it is.

Q. That, sir, is the same answer you gave, is it not, when I initially asked you that question? A. Yes, sir, it is.

1296 Q. Now, how much—

Justice Gassman: Pardon me. You testified you didn't know who wrote the book "House of Dolls".

The Witness: Yes, sir, I do not.

Justice Gassman: Well, did anybody give you that book?

The Witness: Yes, sir.

Justice Gassman: Who did?

The Witness: Mr. Mishkin.

Q. When did he give you the book, sir? A. It was—I write very fast, and it was approximately a week before I turned the manuscript in to him.

Q. Did you have any conversation with him concerning the book? A. Yes.

Q. What was the conversation? A. He wanted —He wanted a book written on—written on female domination.

Q. Did he say anything else? A. He wanted a book that was written on fe—He wanted the 1298
female to be the dominant person in the story.

Q. And did he say anything else that you may recall? A. That this was a book that told about a malefactress.

Q. Did you deliver the manuscript to Mr. Mishkin after you had written it? A. Yes, sir, I did. I received three hundred fifty dollars from him in cash.

Q. Where did you receive this? A. 254 West 42nd Street.

Q. What name appeared as the author of this book? A. Stan Reeves.

Q. And are you at all familiar with Stan 1299
Reeves? A. No, sir, I am not.

Q. I show you People's Exhibit 5, sir, a book entitled "Her Highness". Can you identify this book for us? A. Yes, sir, I can.

Q. What is it, sir? A. This is a book on flagellation written for Mr. Mishkin at his request.

Q. Approximately when, sir? A. "Her Highness" was written in—in the summer of 1958.

Q. Were you paid for it? A. Yes. I was paid three hundred dollars for it.

Q. By whom, sir? A. By Mr. Mishkin.

Q. In what form? A. In cash.

Q. Where? A. This is the book that he took me over to Dino's—This is one of the books he took me over to Dino's, when he paid me. This was a bar and restaurant that was very close to the store at 254 West 42nd Street.

Q. Did you ever have any conversation with Mr. Mishkin prior to the writing of the book concerning the book? A. Yes, I did.

Q. Will you tell us approximately when you
1301 had that conversation and the nature of the conversation? A. I had this conversation with Mr. Mishkin in the early summer of 1958, in which he explained to me that this book—in the first place, he gave me an unbound book that he wanted me to extend. He wanted me to put a story line behind it and extend it. He wanted me to deal very graphically with the implementation of wheels on a female's body, of the darkening of the flesh under flagellation; and he said that the people who read these kind of books didn't care particularly about sex. He wanted me to concentrate mostly on the changing of the
1302 color of the flesh when people were being flagellated, and he didn't want any blood in it.

Q. Mr. Johnson, I show you People's Exhibit 21, and also People's Exhibit 57, two copies of the same book entitled "Screaming Flesh". I ask you, sir, whether you can identify that book? A. Yes, sir, I can.

Q. What is it, sir? A. This is a book that I wrote for Mr. Mishkin.

Q. Approximately when? A. Late in 1958.

Q. And at whose request did you write it? A. This is a book on—This is a book on bondage and fetishism.

Q. At whose request did you write it? A. At Mr. Mishkin's.

Q. And what does the book concern, sir? A. The book concerns bondage and—I mean, light touch of bondage. It contains a lot of fetishism about rubberwear and leatherwear, and it has a strong lesbian theme.

Q. Were you paid for that book? A. Yes, sir.

Q. By whom? A. By Mr. Mishkin.

Q. How much, and where? A. About forty-five or forty-seven dollars. 1304

Q. Where? A. At the Main Stem Book Store.

Justice Gassman: How much did you say?

The Witness: About forty-five or forty-seven. It was either forty-five or forty-seven dollars. At the time Mr. Mishkin was at Main Stem I never received over a hundred dollars for any book except "Raw Dames".

Q. Now, Mr. Johnson, did you have any conversation with Mr. Mishkin concerning the writing of this particular book, if you recall? A. I doubt it, that I had any conversation with him about it, because when he didn't assign me a 1305 book to write I would write and take it down to him; and he would buy it.

Q. Is it your recollection that this was— A. This one, I don't have any recollection about this one.

Q. I show you People's Exhibit 22, and also Exhibit 58, two copies of the same book entitled "Fury"; and I ask you whether you can identify that book? A. Yes, sir, I can.

Q. What is it, sir? A. This is one of the first four books that I wrote for Mr. Mishkin.

Q. And approximately when did you write it for him? A. In September or in August, or September, of 1957.

Q. And were you paid for it? A. Yes, sir. I was paid two hundred twenty-five dollars—two hundred twenty dollars in cash.

Q. By whom? A. By Mr. Mishkin.

Q. Where? A. At 254 West 42nd Street.

Q. Did you have any conversation with Mr. Mishkin concerning the writing of this book? A. Yes, sir, I did, when I first wrote for him a book called "Explosive" in 1957.

1307

Justice Gassman: What is the name?

The Witness: "Explosive".

Q. Don't go into the details of that particular book, sir. A. All right.

Q. What about the conversation? A. Mr. Mishkin had—He and I had had conversations, and he wanted—he wanted these books—he wanted them to have a strong lesbian theme bearing on a hardback book that I had written called "Mavis" by Vixen Press; and he wanted them to have the—the same general setup; and he paid me—he paid me two hundred dollars for the first book, and he wanted them made a little bit longer; and he said he would pay me two hundred twenty dollars for the other books that I wrote for him.

1308

Q. I show you People's Exhibit 23, a book entitled "So Firm and So Fully Packed". Can you identify that book? A. Yes, sir, I can.

Q. What is it? A. This is one of the smaller books that I wrote for Mr. Mishkin. I received a hundred dollars in cash for it. It is a book about tight lacing, and I learned about tight

lacing due to the fact that Mr. Mishkin had asked me, first of all, to write the—to learn about the fetishes; and tight lacing is one of the fetishes that these people like to read about.

Mr. Kern: I respectfully move to strike the latter part of the answer. He was simply asked when the book was written.

Justice Breslin: Yes.

Mr. Kern: And then he made the gratuitous statement he learned this from Mr. Mishkin. 1310

Justice Breslin: Strike out the latter part as not responsive.

Q. Were you paid for the book? A. Yes, sir, I was.

Q. By whom?

Justice Gassman: Wait a minute. Did you get an answer to when it was written?

Mr. Stein: I believe we did.

Q. When did you write this book, sir? A. I wrote this book in the summer of 1958. 1311

Q. And were you paid for it? A. Yes, sir, I was.

Q. By whom? A. By Mr. Mishkin.

Q. In what form? A. One hundred dollars in cash.

Q. Where was this? A. At 254 West 42nd Street.

Q. Is there an author's name that appears on that book? A. No, sir. I don't think there is. No, sir, there isn't.

Q. I show you People's Exhibit 27, a book entitled "Violated Wrestler"; and I ask you whether you can identify that book? A. Yes, sir, I can.

Q. What is it, sir? A. It is a book that I wrote for Mr. Mishkin.

Q. Approximately when? A. Either September, October, of 1958.

Q. And were you paid for it, sir? A. Yes, I was.

Q. By whom, and in what form? A. By Mr. Mishkin.

Q. Where? A. At the Main Stem Book Store, 49th Street and Broadway.

1313 Q. Did you ever have any conversation with Mr. Mishkin concerning the writing of this book? A. Yes, sir, I did.

Q. Approximately when, and what was the conversation? A. Shortly before I wrote this book Mr. Mishkin gave me a book that was printed in California about lady wrestlers, and he told me that he wanted a book that contained a story about a woman wrestler; and I took the book home and read it. There was no story line to the book that he gave me, but I took it home, and I read it; and I put a story line behind it and let the girl be raped; and Mr. Mish-

1314 kin paid for it. He paid less than a hundred dollars. He never gave me over one hundred dollars while he was at 25—while he was at—

Justice Galloway: Main Stem?

A. —the Main Stem, yes, sir.

Q. What is a story line, Mr. Johnson? A. A story line means to weave together the fabric of a story so that there's characterization, there's description, but the story starts at one point and it ends at a point, so that people know that this is really a story, not just a bunch of unconnected incidents.

Justice Gassman: How much did you get for it?

The Witness: I got less than a hundred dollars, sir.

Q. Does the name of an author appear on that book, sir? A. Yes, sir, it does.

Q. What name? A. Justin Kent.

Q. I show you People's Exhibit Number 28, a book entitled "Betrayal"; and I ask you whether you can identify that book? A. Yes, sir, I can.

Q. What is it, sir? A. This is one of the— 1316
this is another of the first four books that I wrote for Mr. Mishkin.

Q. Of the grouping which you already described? A. Yes, sir.

Q. And approximately when did you write that again, sir? A. Sometime between July and November of 1957.

Q. Were you paid for it? A. Yes, sir, I was.

Q. By whom? A. By Mr. Mishkin.

Q. In what form? A. In cash.

Q. How much? Where? A. Two hundred twenty dollars.

Q. Where? A. At 254 West 42nd Street. 1317

Justice Gassman: How much did you get, two hundred ten?

The Witness: Two-twenty.

Justice Gassman: Two-twenty.

Q. Does the name of an author appear on that book? A. Yes, sir. It appears inside the book, by Justin Kent.

Q. Mr. Johnson, I show you People's Exhibit 29, a book entitled "Swish Bottom"; and I ask you if you can identify that book? A. Yes, sir, I can.

1318 *People's Witness, Kenneth Johnson, Direct*

Q. What is it, sir? A. This is a book that I wrote for Mr. Mishkin.

Q. Approximately when? A. Late in 1958.

Q. And at Mr. Mishkin's request? A. Mr. Mishkin and I had been talking at this time about—

Mr. Kern: May I just interrupt—

Q. Mr. Johnson,—

Mr. Kern: —for a moment. The prose-
1319 cutor always asked, "at Mr. Mishkin's request?" In other words, he is leading this witness during a material point.

Justice Breslin: Yes. Don't lead.

Justice Galloway: How did you come to write that book?

The Witness: Mr. Mishkin and I had been talking about "Mavis" and "Fast Curve", the two hardback books that I had sold to Vixen Press; and this book, instead of being baseball, is a book on basketball; and I submitted it to Mr. Mishkin; and Mr. Mishkin bought it.

1320 Q. When you say it is about basketball, what do you mean? A. I mean it has a basketball background.

Q. Did you have any other conversation with Mr. Mishkin concerning the writing of the book, that you recall? A. No, sir, I don't.

Q. Were you paid for it? A. Yes, sir, I was.

Q. By whom, when, and where? A. By Mr. Mishkin, and it was—I was paid at the Main Stem Book Store on 49th Street, and it was always less than a hundred dollars while he was there.

Q. I show you People's Exhibit 30, a book entitled "Raw Dames"; and I ask you, sir, whether you can identify this book? A. Yes, sir, I can.

Q. What is that? A. This is a book that I wrote for Mr. Mishkin at Mr. Mishkin's request.

Q. Approximately when? A. Either in October or November of 1958.

Q. Were you paid for it? A. Yes, sir, I was.

Q. By whom? A. By Mr. Mishkin.

Q. Where, and how much? A. I was paid one hundred fifty dollars for this book. This was the 1322
only book that he paid me more than one hundred dollars for while he was at the Main Stem Book Store.

Q. Is that where he paid you for the book? A. Yes, sir, that was where he paid me.

Q. Do you recall ever having a conversation with Mr. Mishkin concerning the writing of these books?— A. Yes, sir, I do.

Q. —this book? Tell us approximately when you had that conversation and what the conversation was about. A. In either October or November of 1958 I went in to Mr. Mishkin with a manuscript, and Mr. Mishkin gave me eight pic- 1323
tures, and he told me he wanted—he wanted a story built around these eight pictures, and he wanted the captions in the—in the—under the pictures to conform with the text of the material that I would write, and he wanted it done in a hurry; and I did it in two days.

Q. Would you look at that book, please, Mr. Kent,— A. Yes.

Q. —and tell me whether any illustrations appear inside? A. Yes. There are eight illustrations in this book.

Q. And those are the illustrations the story is based on? A. Those are the same illustrations that Mr. Mishkin gave me and let me take home with me to write.

Q. Mr. Kent, I show you People's Exhibit 32—

Justice Breslin: May I see that last exhibit.

(Same handed to His Honor.)

Q. —a book entitled "Dangerous Years"; and I ask you whether you can identify this book?
1325 A. Yes, sir, I can.

Q. What is it? A. This is one of the first books that I ever wrote for Mr. Edward Mishkin.

Q. Approximately when did you write that? A. I wrote this between March and May in 1955.

Q. And were you paid for it? A. Yes, sir, I was. I was paid one hundred sixty-five dollars in cash.

Q. By whom? A. By Mr. Mishkin.

Q. Do you recall where? A. It was—I was paid in the basement of the old Kingsley Book Store.

1326 Q. This was the first book you ever wrote? A. The first book. It is one of the first that I ever wrote for Mr. Mishkin.

Justice Gassman: Where was that book store?

The Witness: It was on 42nd Street. Now the place that was the old Kingsley Book Store is some kind of hamburger heaven or something like that.

Q. Mr. Kent, I show you People's Exhibit 33, a book entitled "Run Girl, Run Hard"—People's Exhibit 33 for identification. That's on the chair, I believe.

Court Officer: Pardon me? He has it.
Mr. Stein: Oh, fine.

Q. Can you identify that book, sir? A. Yes, sir. I wrote it, but, Mr. Stein, I don't remember too much about this.

Q. Well, who did you write it for, do you know? A. I wrote it for Mr. Mishkin.

Q. Do you recall at all approximately when you wrote it? A. No, sir, I don't.

Q. Do you recall whether it was within the past two years? A. Yes, sir. It was within the 1328 past two years. I remember this book.

Q. What do you recall about it? A. Mr. Mishkin told me that I was—

Mr. Kern: May I ask when?
Justice Breslin: Yes. Fix the time.

Q. Give us the time of the conversation, please. A. This was late in 1958. Either September or October of 1958.

Q. Yes? A. Mr. Mishkin told me that I was hitting the lesbian theme too hard. He didn't want one single lesbian in this book, not one. 1329

Q. Yes? A. And there is not one in here.

Q. And the approximate time you wrote it, then, was what? A. I would say about September of 1958.

Q. September of 1958. Is that your best recollection at the present time? A. That's my best recollection at the present time.

Q. Were you paid for it? A. Yes, sir, I was paid for it. I was paid for every book that I wrote for Mr. Mishkin.

Q. By whom? A. By Mr. Mishkin.

Q. Does the name of an author appear on that book? A. By Justin Kent.

1330 *People's Witness, Kenneth Johnson, Direct*

Q. Mr. Johnson, I show you People's Exhibit 34, a book entitled "This Way Down". A. Yes, sir.

Q. Can you identify that book? A. Yes, I can.

Q. What is it, sir? A. This is a book that I wrote for Mr. Mishkin.

Q. Approximately when? A. Late in 1958, while he was at the Main Stem Book Store.

Q. Were you paid for it? A. Yes, sir. I was paid approximately seventy-five dollars, eighty
1331 dollars for it.

Q. By whom? A. By Mr. Mishkin.

Q. In what form? A. In cash.

Q. I show you People's Exhibit 41, and also People's Exhibit 67, two copies of the same book entitled "Look At Her Motor Turn Over". Can you identify these two books?

Court Officer: Did you say "41"?

Mr. Stein: 41 and 67.

Justice Gassman: No. 41 has nothing to do with 67.

Mr. Stein: "Look At Her Motor Turn
1332 Over". 39, rather.

Justice Gassman: 39 and 67.

Mr. Stein: 39 and 67, yes, Your Honor.

Q. Can you identify that? A. Yes, sir, I can.

Q. What is it? A. This is a book I wrote for Mr. Mishkin.

Q. Approximately when? A. About January or February of 1959.

Q. And were you paid for it, sir? A. Yes, sir, I was.

Q. By whom? A. By Mr. Mishkin.

Q. In what form? A. A hundred dollars in cash.

Q. Where? A. At 254 West 42nd Street.

Q. Do you recall anything—Did you have any conversation with him concerning the writing of this book? A. Yes, sir, I did. This is a book that's based on the "Prosecutum".

Justice Gassman: On the what?

The Witness: "Prosecutum".

Q. That's a book by—? A. That's a book by —I don't know. I have forgotten who wrote the book, but it was about somebody in the district attorney's office. 1334

Q. Mr. Johnson, I show you People's Exhibit 43, a book entitled "Columns of Agony"; and I ask you whether you can identify that book? A. Yes, I can.

Q. What is it, sir? A. This was another one of those re-do jobs that I did at Mr. Mishkin's request.

Justice Gassman: Pardon me. What was that exhibit?

Mr. Stein: 43, "Columns of Agony".

Q. When did you write that, sir? Approximately? A. I wrote this in the summer of 1958. 1335

Q. Are you sure of that date, sir? A. No, sir, I'm not. This book could possibly have been written—could have been written early in 1958.

Q. Well, would you think for a moment and give us your best recollection. If you don't recall, and you wish to refresh your recollection, you may do so. If you don't recall, just tell us. A. I don't recall.

Q. If you wish to refresh your recollection, go ahead. A. My notes say that I wrote it late in September, 1958; and that's the answer that I gave you. That's the answer that I have given.

Q. Is that your present recollection? A. No, sir, it is not.

Q. What is your present recollection, sir? A. My present recollection is that I wrote this in the summer of 1958.

Q. In the summer of 1958? A. Yes, sir.

Q. Just a moment, sir. Were you paid for that book, sir? A. Yes, sir, I was.

Q. By whom? A. By Mr. Mishkin.

Q. Where, and in what form? A. I was paid
1337 at Dino's. I was paid three hundred dollars in cash.

Q. By whom? A. By Mr. Mishkin.

Q. Do you recall anything particular—Did you have any conversation with the defendant concerning the writing of this book? A. Yes, I did. Mr. Mishkin gave me an original copy of this manuscript. It was in an unbound form, and he told me practically the same thing that he had told me about other books that he wanted on flagellation, not too much sex, that the people were more—the people who buy this book were more interested in the reddening of the flesh and
1338 in no blood being let because he wanted not too much violence and in—in wheels appearing on the bodies of the victims because this is what the people who bought these books wanted.

Q. Mr. Johnson, I show you People's Exhibit 44, a book entitled "The Tainted Pleasure"—

Court Officer: It is not here, Mr. Stein.

Mr. Stein: There should be only one copy of that book, I believe.

Court Officer: What is the name, please?

Mr. Stein: "Tainted Pleasure". Would you look at the other exhibits? I believe we had only one copy.

Q. I show you People's Exhibit 60, a book entitled "Temptation"; and I ask you whether you can identify this? A. Yes, sir, I can.

Q. What is that, sir? A. This is another one of those first four books that I wrote for Mr. Mishkin in 1957.

Q. Nineteen what? A. 1957.

Justice Galloway: Yes.

Q. And the circumstances of the writing of this book, sir? A. It is the same as the other books —"Betrayal" and the other books that we talked about that I wrote, the first four for him in 1957, that he wanted a strong lesbian theme, a book similar to "Mavis" or "Fast Curve". 1340

Q. Were you paid for this book? A. Yes, sir, I was.

Q. By whom? A. By Mr. Mishkin.

Q. Where? A. At 254 West 42nd Street.

Q. How much were you paid? A. I was paid either two hundred dollars or two hundred and twenty dollars for this book.

Q. In what form, sir? A. In cash.

Q. And does the name of an author appear on this book? A. Yes, sir. 1341

Q. What is the name? A. Justin Kent.

Q. I show you People's Exhibit 69, a book entitled "Woman Impelled", sir; and I ask you whether you can identify this book? A. Yes, sir, I can.

Q. What is that, sir? A. This is a book that I wrote for Mr. Mishkin, between March and May in 1958.

Q. Were you paid for the book? A. Yes, sir, I was. I was paid two hundred dollars for it.

Q. By whom were you paid, where, and— A. By Mr. Mishkin.

Q. —where and in what form? A. I was paid in cash at 254 West 42nd Street.

Q. Did you have any conversation with Mr. Mishkin prior to the writing of this book? A. Yes, sir, I did.

Q. Would you tell us approximately when that conversation took place and what the conversation was? A. This conversation took place in March of 1958, and this is one of the four books that I wrote for Mr. Mishkin that Mr. Mishkin
1343 —that he was supposed to try to sell to another publisher; and if he sold it to another publisher, I would have received seven hundred additional dollars.

Q. I show you People's Exhibit 70, a book entitled "Eyewitness". I ask you, sir, whether you can identify this book? A. Yes, sir, I can.

Q. What is it, sir? A. This is a book that I wrote for Mr. Mishkin.

Q. Approximately when? A. Between July— This is the second book that I wrote for Mr. Mishkin. This is the second book I wrote. This book was probably written in August, 1957.

1344 Q. Were you paid for it? A. Yes, sir, I was.

Q. By whom, where, and in what form? A. By Mr. Mishkin at 254 West 42nd Street in cash.

Q. How much? A. Two hundred twenty dollars.

Q. Do you recall anything concerning the writing of this book? Did you have any conversation with Mr. Mishkin? A. This is another one of the first four books that I wrote for Mr. Mishkin in 1957. About this book, Mr. Mishkin had told me that the first book that I had written for him was a little short, that if I would make it a little bit longer he would pay me an addi-

tional twenty dollars, and this book is approximately twenty pages longer than the first book that I wrote for Mr. Mishkin.

Q. Mr. Johnson, I show you People's Exhibit 71, a book entitled "Stud Broad"; and I ask you, sir, whether you can identify this book? A. Yes, sir, I can.

Q. What is that, sir? A. This is a book that I wrote for Mr. Mishkin.

Q. Approximately when? A. About the first week in June in 1958.

1346

Q. Were you paid for it? A. Yes, sir, I was.

Q. By whom? How much? A. By Mr. Mishkin.

Q. How much? A. I was paid three hundred dollars for this book.

Q. Where, and in what form? A. 254 West 42nd Street. In cash.

Q. Did you have any conversation with Mr. Mishkin concerning the writing of this book, sir? A. Yes, sir, I did.

Q. Would you tell us approximately when you had that conversation and what the conversation was? A. The conversation—I had several conversations with Mr. Mishkin about this book.

1347

Q. Would you tell us approximately when they took place and what they were, sir? A. About the middle of April 1958 Mr. Mishkin decided that he was going to stop publishing for a while, but he wanted to do me some good, he said. So he introduced me to a man who got me in touch with a man named Lieberman, who published hardback books. And I went to Mr. Lieberman, and we talked; and then I wrote fifty pages of a book called "My Name Is Rusty" and an outline; and Mr. Lieberman decided that he wanted to buy that book.

1348 *People's Witness, Kenneth Johnson, Direct*

Q. Go ahead. A. And in the course of writing it and editing the book Mr. Mishkin came to see this Mr. Lieberman several times, and each time that he came to see him if I happened to be there he would make remarks like, "You are taking my writer away from me," and this kind of thing. And when I finished writing the book for Mr. Lieberman, for which he paid me six hundred dollars and took world rights on it, Mr. Mishkin approached me, and he wanted this book written as a take-off on that book.

1349 Q. "Stud Broad"— A. "Stud Broad".

Q. —is a take-off on "My Name Is Rusty"? A. And he wanted this book in a hurry. He wanted this book to come out before "My Name Is Rusty" came out. This book came out—this book came out about four months before "My Name Is Rusty" came out. And as a result of this book coming—I mean, "My Name Is Rusty" didn't enjoy too good a sale.

Q. Were you paid for this book, sir? A. Yes, sir, I was.

Q. By whom? A. In cash, by Mr. Mishkin.

1350 Q. Where? A. At 254 West 42nd Street.

Q. How much? A. Three hundred dollars, sir.

Q. Mr. Johnson, I show you People's Exhibit 72, a book entitled "Queen Bee". I ask you whether you can identify this book? A. Yes, sir.

Q. What is that, sir? A. This is the last of the four books that I wrote for Mr. Mishkin in this period between March and May of 1958.

Q. Were you paid for this book? A. I was paid two hundred dollars in cash.

Q. Approximately when? A. The last of April or around the first of May in 1958.

Mr. Stein: What was that one exhibit we cannot find again? What was that?

Court Officer: 44.

Mr. Stein: 44.

Justice Gassman: You say you got how much for this "Queen Bee"?

The Witness: Two hundred dollars.

Justice Gassman: Two hundred dollars. 1352

Q. Do you recall writing a book entitled "The Tainted Pleasure" at any time? A. Yes, sir, I do.

Q. And is that the name that you gave the book? A. That's the name that I gave the book. This is a book that contains two stories instead of one. This is when Mr. Mishkin stopped me from writing on double-spaced paper and writing on single-spaced paper so that he didn't have to pay a typist to redo the book over. I received one hundred dollars for it.

Q. Approximately when did you write it, sir? 1353
A. Between January and February, 1959.

Q. And where were you paid for it? A. I was paid for it at 254 West 42nd Street.

Q. In what form? A. In cash.

Mr. Stein: You may inquire, Mr. Kern.

*Cross Examination by Mr. Kern:*

Q. Now, Mr. Johnson, this sheet of paper which you have been examining from time to time while answering the district attorney's questions—

Justice Gassman: Is now marked Exhibit 75 for identification.

Q. —Exhibit 75 for identification, you wrote this at one of your conferences in the office of the district attorney, is that correct? A. Yes, sir.

Q. And you wrote this, I assume, while Mr. Stein, or some police officer, was questioning you, is that right? A. While some police officer was questioning me, yes, sir.

1355 Q. Not Mr. Stein? A. Not Mr. Stein.

Q. Was that Inspector Planska? A. No, sir, it was not.

Q. Well, it was some police officer who had all these books in the room with him, isn't that correct? A. Yes, sir.

Q. And how many times would you say you visited at the district attorney's office? A. About five.

Q. During the last two weeks, how many times were you there? A. About two, sir.

Q. Two? I see. Now, the very first time you went to the district attorney's office was when?

1356 A. It was some time preceding—It was somewhere around January the 2nd or 3rd of 1960.

Q. You are sure about that, sir? A. Yes, sir, I'm sure about that.

Q. When you say the 2nd or 3rd, 1960—the 2nd or 3rd of January, 1960,— A. Yes, sir.

Q. —you gave that answer after about ten seconds of thought,— A. Yes, sir,—

Q. —is that right? A. —because I had to think.

Q. And this was a meeting in the district attorney's office? A. Yes, sir.

Q. And was Inspector Planska there? A. I don't remember, sir.

Q. Was Mr. Stein there?—the prosecutor. A. Yes, sir, Mr. Stein was there.

Q. And a lot of books were piled up in the room? A. No, sir.

Q. Didn't you see cartons of books? A. No, sir.

Q. Did they talk to you about the books? A. No, sir. Wait a minute. Yes, sir, they talked to me about the books. 1358

Q. Did they talk to you about books which had been seized or taken by police from certain premises? A. No, sir.

Q. Did they talk to you about books which you wrote? A. Yes, sir.

Q. Did you give them the names of the books at that time? A. Yes, sir, I did.

Q. Was Mr. Levenberg there? A. No, sir.

Q. And they had no books in the district attorney's office at the time? A. At the time of my first meeting with the district attorney, sir, they had no books there.

Q. Well, can you recall, Mr. Johnson, when it 1359 was for the first time in the district attorney's office that you saw a large number of books? A. I think I can sir.

Q. About when? A. About the 12th or 13th of February in 1960.

Q. 1960? A. Yes, sir.

Q. And the books were all there, is that correct? A. Some of the books were there.

Q. Now, at your first conversation they asked you for the dates when you wrote the books which you listed? A. No, sir.

Q. You told them the names of books, didn't you? A. Yes, sir.

Q. Didn't they ask you when you wrote those books? A. No, sir, not then.

Q. Did they ask you when you had been paid for those books? A. No, sir.

Q. Did they ask you for whom you wrote the books? A. Yes, sir.

Q. Now, there was a time when they asked you to fix a date when you wrote the books? A. Yes, sir.

Q. When was that? A. About February 12th
1361 or 13th. I was supposed to go through these books that I had previously named—

Q. All right, Mr. Johnson. A. —and—

Q. Now, they showed you the books and they asked you when did you write this book, and this book, and this book, is that right? A. I would like to—I would like to do this, sir—

Q. No, no. Did they, Mr. Johnson, show you books and ask you when you wrote each book? A. They didn't show me—

Q. Mr. Johnson, did they show you, on or about February 12th or 13th, in the district attorney's office—did they show you books and
1362 ask you when you wrote each book? Yes or no? A. No, sir.

Q. When did they do that? I ask you that question.

Justice Galloway: If ever.

Mr. Kern: Beg pardon?

Justice Galloway: If ever.

Mr. Kern: Yes. If they ever did.

Justice Galloway: Did they ever do that, Mr. Johnson?

The Witness: No, sir.

Justice Galloway: All right now.

The Witness: This is that they did, sir,—

Q. Wait a minute. Wait a minute, Mr. Johnson. A. I am sorry.

Q. Please.

Mr. Kern: He has answered the question. I don't know what he is going to volunteer now. I respectfully—

Justice Gassman: Do you want to correct your answer?

The Witness: Yes, sir, I do want to correct my answer, because the first time I saw the books was not at the district attorney's office. 1364

Justice Galloway: All right.

The Witness: The first time that I saw these books I was being held as a material witness in Civil Jail at 437 West 37th Street—West 37th Street.

Q. When was that? A. Between February 10th and March 14th, 1960. That's the first time I saw the books.

Justice Gassman: Where did you see them?

The Witness: I saw them in the warden's office. Two detectives brought the books down 1365 and had me go in the warden's office and mark through the books, and this is the first time that I had seen the books.

Q. Now, how long after that did you get out of the Civil Prison? A. I got out on March 14, 1960.

Q. And when was it that they saw you in the Civil Prison? A. About February 12th or February 13th, 1960.

Q. You stayed there for one month, is that correct? A. I stayed there for thirty-three days, sir.

Q. Now, at the time you were lodged in the jail, did some detective connected with the district attorney's office take you there? A. Yes, sir, two detectives.

Q. And did he tell you that you might be prosecuted for your part in writing, or preparation, or publishing of these books? A. No, sir, he did not tell me that, sir.

Q. No one ever made any statement to you to the effect that you might be prosecuted in
1367 this case? A. No, sir, no one made the—

Q. As a matter of fact, you said you never heard of anything like that until this very moment? A. I never heard a thing like that.

Q. Is that correct? A. That's right, sir.

Q. Now, when did you say—or did you say when for the first time you were asked the dates when you wrote these books? A. Yes, sir, I did.

Q. Was that in the jail? A. That was in the jail.

Q. And the books were there, is that correct,— A. Wait a minute.

Q. —with the detectives? A. I want to answer
1368 you truthfully, sir. I don't think I was asked in the jail.

Q. Well, where was it? A. The first time I was asked about the books, the first time I saw the books was when I was in the jail.

Q. Mr. Johnson, I am trying to find out—

Mr. Stein: Objection.

Q. —when—

Mr. Stein: I think the witness is trying very hard to recall now.

Justice Breslin: Had you finished your answer?

Mr. Stein: I wish he had the chance.

The Witness: No, sir.

Mr. Kern: He is not being responsive in any event.

Mr. Stein: He is responsive.

Justice Breslin: He hasn't completed his answer, he said.

Q. I am sorry. Go ahead. A. I was not asked when I wrote those books while I was—when those detectives came down there. They wanted 1370
me to mark out what were the pages that I thought were salacious, but they didn't ask me when I wrote it. No, sir, they didn't. When was I first asked when I wrote those books? Around March 5th or 6th.

Mr. Kern: Now, of course, this was the point of my interrupting the witness, because he volunteered something which wasn't asked. I asked him for a date when he was asked to give the date of the writing. He talks about, "Well, they wanted me to point out certain passages." 1371

Justice Breslin: You got it—March 6th.

Mr. Kern: No, no. Then he adds, and this is purely gratuitous on his part, "They asked me to mark out certain passages in the book." I didn't ask him that.

Justice Breslin: All right. We will strike that out as not responsive.

Mr. Kern: Thank you.

Justice Breslin: The rest of the answer stands.

Mr. Kern: Thank you.

Q. Now, was it in March you would say you were asked when you wrote the books? A. Around March 5th or 6th, yes, sir.

Q. Where was that, in the district attorney's office? A. That was at the district attorney's office, yes, sir.

Q. You couldn't remember very clearly when you wrote each one of these books, could you? A. Yes, sir, I could.

Q. There was no question about it in your mind? A. Yes.

1373 Q. You gave them the dates right away? A. No, sir. There was a question about it, because these books—after a certain amount of these books—some four, and four, and others—I remember vividly, but—

Q. Well, you were questioned about twenty-two books— A. Yes, sir.

Q. —during the last half or three-quarters of an hour? A. Yes, sir.

Q. All of these books except one, three—one, two—except three, were written between March of 1958 and January or February of 1959?

1374 Within a period of ten months, is that correct? A. Yes, sir.

Q. And during all that time you did the necessary research, is that correct? A. On some of them, sir, I had done the research some ten or eleven years before.

Q. All right. You read such books as "House of Dolls",— A. Yes, sir.

Q. —and other books, upon which you based these—these novels of yours? A. Yes, sir.

Q. You wrote them all? A. Yes, sir.

Q. Did you type the manuscripts yourself? A. I typed the manuscripts, each and every one, myself.

Q. Yourself? A. Yes, sir.

Q. And you edited the manuscripts? A. I did not edit them.

Q. By the way, these exhibits—on the cover of the exhibits—

Mr. Kern: Now, may we have Exhibit 69, please.

Q. Now, on these exhibits—will you take a look at 69, please? A. Yes, sir.

Q. Now, on the back of this exhibit there's 1376
a certain legend, is there not—certain language? A. Yes, sir.

Q. Did you ever see that before? A. I wrote this, sir.

Q. You wrote it and— A. I copied this. I copied this out of a dictionary.

Q. You mean you copied the whole page out of the dictionary? A. I copied the description of a nymphomaniac, sir.

Q. You copied the definition of the word "nymphomaniac"? A. Not "nymphomaniac". A nymphomaniac is what's there.

Q. Well, a nymphomaniac— A. Yes, sir. 1377

Q. Excuse me, please. Now, the next paragraph, you didn't find that in the dictionary, did you, Mr. Johnson? A. Let me see it, sir.

Q. "'Woman Impelled' is the story of a marriage", and so on, and so forth? A. No, sir. I didn't find that in the dictionary, but this—this is—How shall I put it? This is one of the things that writers call poetic license, that they use certain descriptions and put the thing in their own words; and this is what I did here.

Justice Breslin: You wrote that, in other words?

The Witness: Yes, sir, I wrote this.

1378

Justice Gassman: May I have this exhibit, please? (Same submitted to His Honor.)

Q. And that was printed as you wrote it, is that correct? A. Yes, sir. It was printed exactly as I wrote it.

Q. Now, with reference to that passage and with reference to that book particularly, did you say that that book was based upon another book called "By Love Possessed"? A. No, sir, I did

1379 not.

Q. Did you write "By Love Possessed?" A. No, sir, I didn't. James Cousins wrote "By Love Possessed", and it was a best seller.

Q. Did you read "By Love Possessed"? A. I read "By Love Possessed", but there's nothing comparable in "Women Impelled". In "By Love Possessed"—

Q. Well, with reference to "Woman Impelled", did you make this statement in words or substance: There are certain passages in "By Love Possessed" which are much more frank than any

1380 passage in "Woman Impelled", but each passage contained in each book is there legitimately to weave the actually existing facts into the purpose which motivated the writing of the book?

Mr. Stein: Your Honor, I wonder if we can have marked for identification whatever Mr. Kern is reading from?

Mr. Kern: No. These are my notes.

Justice Breslin: No.

Mr. Stein: All right.

Q. Did you ever make any such statement in words or substance? A. Would you repeat that, please?

Q. There are certain passages in "By Love Possessed" which are much more frank than any passage in "Woman Impelled", but each passage contained in each book is there legitimately to weave the actually existing facts into the purpose which motivated the writing of the book? A. Yes, sir, I think I did make that statement in a piece of paper that I submitted to Mr. Mishkin.

Q. Did you also write in that piece of paper, referring to this book "Woman Impelled": "The 1382
story of an average, ordinary, lawabiding man and woman who were intelligent enough to preserve their marriage despite the depths to which her feverish, insatiable desire impelled her before he found a way to save her from herself"? A. That, sir, is on the back of that book. That's the statement you asked me about.

Q. Yes. A. Yes, sir, I wrote that, sir.

Q. And that, you intended to say, Mr. Johnson, was the message to be conveyed by that book,— A. Yes, sir.

Q. —is that correct? A. (Witness nods af- 1383
firmatively.)

Q. Now, you are a married man, aren't you, Mr. Johnson? A. No, sir. I am divorced.

Q. You've had considerable writing experience, haven't you? A. Yes, sir.

Q. And you say—By the way, you met this defendant in the year 1957, is that correct? A. No, sir. I said I met him in 1955.

Justice Gassman: Mr. Kern, may I interrupt you for a moment, please?

Mr. Kern: Yes. I'm sorry.

Justice Gassman: Do you know who is Ann G.?

The Witness: That was my fiance, sir.

Justice Gassman: Now, this book "Woman Impelled," Exhibit 69, contains on the front page "Dedicated to Ann G., my beloved, whose inspiring presence made this book possible."

The Witness: Yes, sir.

Justice Gassman: Was that part of fiction, or is that a fact?

The Witness: No. That is fact, Your Honor.

Q. You are still engaged to this lady, I sup-
1385 pose? A. Yes, sir.

Q. Now, did you also ever make this statement in words or substance with reference to one of the books—"Eyewitness"—Did you write "Eyewitness"? A. Yes, sir, I did.

Q. Did you say: "This treatise includes sections from published novels, articles, and pseudoscientific books which the general public has access to. It is designed for use by any attorney who wishes to prove the assinity"—you mean "assininity"? A. I said "assininity".

Q. Well, "assinity" appears here. A. I said "assisinity", if I wrote that, sir.

1386 Q. —"assinity of allegations regarding not only the Justin Kent books, but most of the books which there seems to be a general rush on banning."

Did you write that in words or substance? A. I don't remember writing that, sir.

Q. Well, will you look at this and tell us if it isn't a fact that this is your language in your own writing typed by you? A. I think I did type this up.

Q. Well, as a matter of fact, Mr. Johnson, you typed this—this whole sheaf of papers which you refer to as a treatise, is that correct?

Mr. Stein: May we have that sheet marked for identification?

Mr. Kern: Yes. I am going to do that, Mr. Stein.

Q. Just look at all this. Isn't this your treatise on pornography? A. No, sir, this isn't. This isn't. That isn't.

Q. You say you didn't write these? A. I said I wrote that, but this is not no treatise.

Q. All right. I am mistaken. Just pick out those papers which constitute the treatise. 1388

Justice Gassman: What did you call it, Mr. Johnson, a treatise on what?

The Witness: Pornography.

Mr. Kern: Treatise—

Justice Gassman: On pornography?

Mr. Kern: —on pornography. Yes, I did get these papers mixed a bit. There's a story contained in this. I'm sorry.

The Witness: Excuse me. I am tearing this one. I didn't know it.

Mr. Kern: It is all right. 1389

Q. Now, Mr. Johnson, you wrote this? A. I wrote every word of it, sir.

Q. And your purpose in writing this was what? A. At the time I wrote that, sir, I was still naive enough to believe—

Justice Gassman: You were what?

Mr. Kern: Now, I object to that, Your Honor,—what he is going to tell us about how naive he was. I asked him what his purpose was in writing this treatise.

Justice Breslin: Well, answer the question. Strike out the answer.

The Witness: I am trying, Your Honor.

Justice Breslin: Go ahead. Answer it.

A. I believe that Mr. Mishkin could be convinced that I was a good writer; and by showing him that the writing that I was doing was comparable to the writing that was done in the various books mentioned in this treatise, that he would give me the kind of break that other
1391 publishers had given the writers who wrote those books. That's what I believed. And I quoted for him examples of various writing, because I read extensively; and I knew that with proper editing of my manuscripts, that I would be among those writers who have made their mark in the world.

Q. Yes. Now, Mr. Johnson, of course, you as you said a moment ago, wrote this treatise before you really began to write extensively for Mr. Mishkin? A. No, sir. I had written—

Q. Well, was it after you had finished writing all these books? A. It was after I had written
1392 two books for Mr. Mishkin—

Q. Yes. A. —that I wrote that treatise.

Q. All right. So that only two books of all of those which you say you wrote had been written at the time you wrote this,— A. Yes, sir.

Q. —is that right? Now, this—referring to—

Mr. Kern: Has this been marked?

Justice Gassman: No.

Mr. Kern: May I have this marked as an exhibit for identification?

Justice Gassman: Defendant's Exhibit A for identification. (So marked.)

Q. Now, Mr. Johnson, you wanted to show Mr. Mishkin that these books which you had written and which you were capable of writing, were really good literature, isn't that so? A. No, sir.

Q. Did you want to show him that they were in a class with some of the very finest literature in the world? A. No, sir.

Q. Did you want to show Mr. Mishkin that you were a good writer? A. Yes, sir.

Q. You wanted to show him, for instance, that 1394
the books that you were capable of turning out might be in the same class with books which—which you refer to in this treatise, isn't that correct? A. No, sir. I didn't think that a book that I had written would compare with "By Love Possessed", which was a best seller,—

Q. Well,— A. —but I thought that books that I had written would compare with some of these books.

Q. You spent a great deal of time in the treatise to convince the reader that what you were writing was not pornography, isn't that so? A. No, sir. 1395

Q. Are you sure about that right now? A. Yes, sir, I am sure.

Q. Well, what was your point, Mr. Johnson, when you wrote this:— A. My point—

Q. Wait just one minute. "Who can draw the line between what is pornography and what is realistic writing? Pornography, according to most dictionary definitions I have read, is written or drawn material designed solely to inflame and agitate the baser passions of human minds.

"What kind of material does this: I ask. How can life be realistically treated in literature if

the natural inclinations must be omitted? Could the story of Lot and his two daughters have been omitted from the Holy Bible? It was included because the writers then knew there had to be some explanation as to how procreation went on when Lot—and his two daughters were removed from the civilation of their day, and "there was no man left to come in unto them"—except their father.

"Could that sentence not be regarded as por-
1397 nographical even though it can be found in every Holy Bible?"

Would you tell the Court what you mean by that passage? A. I meant what I wrote, sir.

Q. Isn't it a fact that Mr. Mishkin told you he wanted you to write about flagellation, and about the dominant women, and about lesbianism, but not to violate the law in doing so? Isn't that right? A. No, sir.

Q. And isn't that really the reason that you wrote this treatise, to convince him that what you were writing was not pornography? A. No, sir.

1398 Q. Yes or no? A. That is not true.

Q. Is that why you referred to the "Holy Bible"? A. May I tell you, sir—

Q. No, no. Did you refer to the "Holy Bible" to show that what you had written was not pornographic? A. May I tell you, sir, in answer—

Q. Did you refer to an author by the name of Brooks—

Justice Galloway: You know, Mr. Kern, you never got an answer to your question.

Mr. Kern: Oh, I apologize. I am so sorry.

Q. Go ahead. I am sorry, Mr. Johnson. A. When I wrote that, sir—when I wrote that treatise I did not know anything at all about fetishism, flagellation, or anything at all. If you will look at that thing, that thing is written there as an answer to the two books that I had written for Mr. Mishkin at that time, "Eyewitness" and "Explosive". It is on there itself.

Q. Well, you wrote this after you had written two books, isn't that so? A. In "Eyewitness" and "Explosive" there's nothing on flagellation, 1400
there's nothing about fetishism, and there's nothing about any of that freakish stuff. There's nothing there.

Q. Mr. Johnson, you wrote this— A. I wrote it after I had written those first two books, sir.

Q. Mr. Johnson, you wrote this fifty-one page treatise after you had written— A. Two books.

Q. —two books,— A. Yes, sir.

Q. —in order, as you said, to convince Mr. Mishkin of something? A. I didn't have to convince Mr. Mishkin of anything, sir.

Q. Did you write this to show Mr. Mishkin that you were capable of writing really good 1401
books? A. I wrote this to convince Mr. Mishkin that not only was I capable of writing books, but I was capable of writing articles. I wrote this for him and turned it in to him, and this I was not paid for. This I did on my own.

Q. I understand that, but Mr. Johnson, this is an answer to pornography, isn't it? I withdraw that. I will withdraw that. Isn't this a treatise which opposes the thought that certain books which were then in circulation, and are still in circulation, should be banned because of their alleged pornographic nature? A. No, sir. For this—

Q. Isn't the whole theme—isn't the whole theme of this treatise your question, "What is pornography?" and "What is not pornography"? A. Yes, sir.

Q. And you spend fifty-one pages in explaining your thoughts on pornography— A. Yes, sir.

Q. —and to convince that whatever you wrote was not pornographic, isn't that right? A. Yes, sir.

1403 Q. You didn't write anything pornographic, did you? A. Yes, sir.

Mr. Stein: Objection. We are talking about a time period. I would like it fixed.

Justice Breslin: Well, he answered, "Yes."

Mr. Kern: All right.

Justice Galloway: He said, "yes," he has.

Q. And then you wrote this article, is that correct? A. Yes, sir.

Q. In order to show that what you wrote and
1404 what you say was pornographic was not, in fact, pornographic? Is that your idea? A. Yes, sir.

Q. Well, again, may I ask: If you wrote a book which you thought was pornographic and then wrote this fifty-one page treatise, the first paragraph of which says, "It is designed for use by any attorney who wishes to prove the assininity of allegations regarding not only the Justin Kent books, but most of the books which there seems to be a general rush on banning." What did you have in mind?

Mr. Stein: Objection.

Justice Breslin: Overruled.

1405

Mr. Stein: I respectfully except.

Justice Breslin: We will let him answer. Go ahead.

A. At the time, sir, that I wrote that I was under the impression that Mr. Mishkin was going to put out my books in hardback covers as —as had been done with "Mavis" and "Fast Curve", two books by which Mr. Mishkin came to know me. And I had been doing a lot of studying about pornography. A man named D. H. Lawrence wrote something like "I served 1406
my country with distinction and"—

Mr. Kern: Oh, I know the gentleman is patriotic, but I don't think he is answering the question.

Justice Breslin: No. He is quoting something.

The Witness: I am trying to tell you why I wrote this.

Justice Galloway: You are quoting something by D. H. Lawrence, are you not?

The Witness: Yes.

Justice Breslin: Go ahead. 1407

A. (continuing) That "I served my country with distinction and my queen with devotion for thirty years, but I had to write a pornographic book in order to achieve fame and material wealth;" and this is the guy who translated the "Arabian Nights" into English. I mean, I have been doing a lot of studying, sir, about pornography, because every writer has to be concerned about whether his writing could be considered as pornography or whether it could be regarded as realistic fiction. And right

now I am trying to learn my craft still. I am still trying to learn my craft, and to learn my craft I have to write what publishers want. Not only does Mr. Mishkin want this, but all the publishers today seem to want sex and violence, so I—

Justice Galloway: Let me ask you a question, Mr. Johnson.

The Witness: Yes, sir, Your Honor.

Justice Galloway: You had only written two
1409 books for Mr. Mishkin at the time you wrote this treatise.

The Witness: Yes, sir.

Justice Galloway: Now, up until that time, had you ever written what you considered a pornographic book?

The Witness: Every book, Your Honor, that I had written up to this time was breezy. I had not considered it as—as pornographic, no, Your Honor.

Justice Galloway: All right. That's all I wanted to find out.

1410 Justice Breslin: You may go on. All right.

Q. Now, Mr. Kent—Mr.—

Mr. Stein: Johnson.

Q. Mr. Johnson, are you familiar with Kingsley Book Shop on 42nd Street? A. I'm not too familiar with it.

Q. Well, you have been there, haven't you? A. Yes, sir, I was there.

Q. Were you there to buy books or to sell books? A. I think I bought some books there.

Q. By the way, Mr. Johnson, I dislike asking you this question: Have you ever been convicted of a crime? A. No, sir.

Q. Do you use drugs? A. No, sir.

Q. Never used drugs? A. Never used drugs in my life.

Q. Never used a hypodermic syringe? A. Never used a hypodermic in my life, sir. I am scared of them.

Q. All right. Now, Mr. Johnson, you have written books for Vixen Press, haven't you? 1412
A. Yes, sir, I have.

Q. How many books did you write for Vixen Press? A. Two.

Q. When was that? A. The first one was in March in 1953. It was called "Mavis". And the second one I completed in June of 1953. It was called "Fast Curve".

Justice Breslin: Called what, sir?

The Witness: "Fast Curve". Those are two hardback books.

Q. Those are the only books you wrote before you met Mr. Mishkin? A. The only books— 1413

Q. Yes? A. —that I wrote, yes, sir.

Q. And those are the same kind of books which you wrote for Mr. Mishkin,— A. Yes, sir,—

Q. —isn't that correct? A. —except for one distinction, sir. Both "Mavis" and "Fast Curve" were edited after I wrote them. A writer who writes today as a freelance writer is supposed to over-write his sex scenes and his violent scenes, and then it is the responsibility of an editor who knows what he is doing to delete, because it is easier for an editor to take out than it is for him to add to.

Q. Yes. Now, both "Mavis" and "Fast Curve", so far as I know, they have not been found objectionable. Well, the reason for that, Mr. Johnson, lies in the fact that the proofs were edited before they finally went to press— A. Yes, sir.

Q. —and the objectionable features were removed? A. Yes, sir.

Q. You helped in the editing with the gentlemen? A. No, sir.

Q. Well, then, somebody did edit those books, is that correct? A. Yes.

1415 Q. And then, during that period when you wrote those books which, as you say, are the same as this type of book, you wrote other books, did you not? A. Other books?

Q. You wrote other books for other firms or other publishers? A. No. I have written books only for Mr. Mishkin, for Mr. Leiberman, and for Mr. Gildfox, who, at that time, was head of Vixen Press.

Q. Now, Mr. Johnson, directing your attention to those books which you say were edited by some gentleman, he discussed his work on your

1416 books before they finally went to the printer? A. Mr. Gildfox did not discuss with me anything. Mr. Gildfox was a capable editor, and he edited his own books.

Q. Weren't you interested, Mr. Johnson, in finding out, or in knowing, in what respects your brain child had been altered or what portions had been eliminated or what additions had been made to your language? A. No language was added to my language, as I told you, sir. I overwrote. I overwrote by instruction, so that it was easy for him to take out that which was objectionable. Now, with Mr. Leiberman, when

I wrote with Mr. Leiberman, I wroked with Mr. Leiberman, and we discussed almost word by word those features which he felt were objectionable; and we put both our ideas together, and we worked on that book—that one book.

Q. I see. A. But with Mr. Mishkin, Mr. Mishkin took just as I typed. He paid for it without looking at it at all, and he published it just like it was.

Q. And, Mr. Johnson, having learned from previous experience as a result of the writing 1418
by you of these two books before you met Mr. Mishkin, you were careful, were you not, that you would not overstep the bounds of propriety? A. No, sir, I—

Q. You didn't care about that, is that correct? A. At this time I did not care about it, because I was writing to sell;—

Q. You were writing for what? A. —and this is what Mr. Mishkin wanted, and I wrote what he wanted.

Q. Did you think you were violating the law when you wrote what you say Mr. Mishkin wanted? A. No, sir, I did not. 1419

Q. Now, you mean to tell this—I will withdraw that. You tell the Court now that after all this experience you had, you discussed with Mr. Mishkin every one of these books and what Mr. Mishkin wanted you to put in these books before you wrote them, all within a period of ten months, is that correct? A. No, sir.

Q. Well, the greater part of the books you say were suggested by Mr. Mishkin;— A. Yes, sir.

Q. —and he told you what to put into them and what not to put into them, isn't that correct? A. Yes, sir.

1420 Q. And he told you at one time there was a little too much flagellation or too much bondage or too much lesbianism, isn't that so? A. Yes, sir, lesbianism; not flagellation, not bondage.

Q. All right. And to taper off a little bit on it, isn't that correct? A. Yes, sir.

Q. And he told you to be careful and not to overstep the bounds of propriety, didn't he? A. No, sir, he did not tell me—

Q. And isn't—

1421 Mr. Stein: Objection.

Mr. Kern: I am sorry. I am sorry. I didn't mean to shut him off.

Justice Breslin: Go ahead.

Q. My apologies, Mr. Johnson. Go ahead. A. No, sir, he did not tell me not to overstep the bounds of propriety. He told me to look at all of these books. "Justin," he said, "all of these books got lesbianism. Let's—Now, let's taper off on it."

Q. Wasn't it, then, Mr. Johnson, in an effort to convince Mr. Mishkin that what you were
1422 writing was within the spirit of the law, you wrote this treatise, Defendant's Exhibit A in evidence? A. No, sir. I wrote this after I had written the first two books.

Justice Gassman: It is not in evidence.

Mr. Kern: Marked for identification, I mean.

Justice Breslin: We will take a brief recess now.

Mr. Kern: Yes.

(Recess.)

Mr. Kern: I will be just a moment now.

Justice Galloway: Beg your pardon?

Mr. Kern: I am sorry. I said, "I will be just a moment."

Justice Galloway: Take your time.

KENNETH JOHNSON resumes the witness stand.

Court Officer: Just have a seat. You are still under oath.

1424

Mr. Stein: Your Honors, I earlier neglected to ask to be received in evidence People's Exhibit 33 for identification, which the witness testified he had written for Mr. Mishkin; and I, at this time, offer it in evidence.

Mr. Kern: No objection.

Justice Breslin: All right, that is received. That is Exhibit 33. (So marked.)

Q. Mr. Johnson, referring now to Defendant's—People's Exhibit 75 for identification, where did you make that list, where did you write that? A. I made this list to familiarize myself 1425 with the dates that I had told the district attorney that I had written these books, the amounts written, so that I could take it home with me and study it when I didn't have anybody questioning me and find out for myself, because I wanted to tell the truth about it to the best of my recollection just whether I had told him the actual truth or I hadn't, if I had been mistaken.

Q. You testified that you remembered perfectly at the time you answered those questions. A. I told you, sir, I think that I testified to the best of my recollection at that time and now, sir.

1426 Q. And notwithstanding that your memory was good as to the dates when you say you wrote those books, you wrote this list in the district attorney's office, isn't that correct— A. Yes, sir.

Q. —while the district attorney was questioning you? A. No, sir, the district attorney was not questioning me.

Q. After he had finished? A. The district attorney had not asked me anything on that date, sir.

1427 Q. Oh, then you wrote this before the district attorney questioned you, is that right? A. No, sir.

Q. Well, was it afterwards? A. It was not immediately afterwards, sir.

Q. But it was afterwards? A. It was afterwards, yes, sir.

Mr. Kern: All right. Now, may I offer in evidence Defendant's Exhibit A for identification.

Mr. Stein: No objection.

Justice Breslin: All right, received, Defendant's A in evidence. (So marked.)

1428 Mr. Kern: And that's all.

Justice Breslin: Is that all, Mr. Kern, of this witness?

Mr. Kern: That's all.

Court Officer: Step down.

Justice Breslin: All right. We will suspend.

Justice Gassman: Mr. Kern, do you expect to use the Exhibit A overnight?

Mr. Kern: I have read it. I can do without it. I would prefer that the Court

read it, if the Court wants to read it at this time. (Defendant's Exhibit A handed to Their Honors.)

Justice Breslin: We will take a recess now until ten-thirty tomorrow morning.

(This Is To Certify that the foregoing is a true and correct transcript of the within proceeding as recorded by me.)

PAUL H. PETERSON
Official Court Reporter 1430

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Court Officer: Case on trial—Edward Mishkin, Number Two.

Mr. Stein: Ernest Stanton.

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ERNEST STANTON, having been called as a witness, was first duly sworn and testified as follows: 1431

Court Officer: Be seated. Please keep your voice up. What is your name?

The Witness: Ernest Stanton.

Court Officer: What is your home address?

The Witness: 130-15 130th Street, South Ozone Park, Long Island.

Court Officer: What is your business or occupation?

The Witness: Artist.

Justice Gassman: A what?

The Witness: Artist. Artist.

Justice Gassman: What is your second name.

The Witness: I have no second name. Ernest Stanton.

Justice Gassman: Stanton?

The Witness: That's right.

*Direct Examination by Mr. Stein:*

Q. Mr. Stanton, how long have you been an artist? A. About fifteen years.

Q. And have you ever attended any schools for art work? A. Yes.

1433 Q. Where is that? A. Cartoonists and Illustrators, on 23rd Street.

Q. Approximately when? A. '52.

Q. Do you know the defendant in this case—Mr. Mishkin? A. Yes, I do.

Q. When was the first time you met him, sir? A. Oh, I couldn't tell you the exact year, but about '55, '56.

Q. And have you ever done any work for him? A. Yes, I have.

Q. What type of work, sir? A. Art work.

Q. I show you People's Exhibit 1A—1A through 1L, a series of twelve drawings; and I

1434 ask you, sir, whether you can identify these drawings? A. Yes. They are mine.

Q. What are they, sir? A. Pardon?

Q. What are they? A. They are art drawings.

Q. Do you know who drew them? A. Yes. I did.

Q. For whom, sir? A. Oh, for Mr. Mishkin.

Q. Now, can you tell us something about these —Did you have a conversation with Mr. Mishkin prior to the time you did these drawings? A. No. He just gave me a—a book, and I illustrated it.

Q. Well, you spoke to him when he gave you the book, didn't you? A. Yes.

1435

Q. And what was the—When did this conversation take place, roughly? A. About—well, I would say about spring of '58.

Q. And do you recall where it took place? A. In the store—Publishers Outlet.

Q. 254 West 42nd Street? A. Yes.

Q. Now, you say he gave you a book, is that right? A. Yes.

Q. Was that a book or a manuscript, sir? A. manuscript.

1436

Q. And what did you—Tell us the conversation that took place? A. Well, I—I wanted some work; and I asked Mr. Mishkin if he had any work for me. He said he had. He handed me the script; and he said, "Illustrate the script;" and that was the work.

Q. I show you People's Exhibit 1, a book entitled "Chances go Round". Does this book appear to be a reproduction—Is this book a reproduction of a manuscript which Mr. Mishkin gave you, sir? A. Yes.

Q. Did you hand these drawings over to Mr. Mishkin, sir? A. Yes.

1437

Mr. Kern: May I ask that Counsel not lead the witness?

Justice Breslin: Yes. Don't lead.

Q. After you drew Exhibits 1A through 1L, those twelve drawings, what did you do with them, Mr. Stanton? A. I brought them to Mr. Mishkin.

Q. Where, sir? A. At Publishers Outlet.

Q. And approximately how long did it take you to do them? A. Oh, I would say a day a page or a day two pages. Sometimes—It varies on how I feel.

Q. And did you give them to Mr. Mishkin personally when you say you gave them to him? A. Yes, I did.

Q. What happened when you gave them to him? A. I was paid.

Q. How much? A. Ten dollars per—

Q. Ten dollars? A. Ten dollars per illustration.

Q. In what form? A. Cash.

Q. Sir, I show you People's Exhibit 4A—4A, and I ask you if you can identify this? A. It's
1439 not mine.

Q. I'm sorry. A. Yes.

Q. People's Exhibit 21A. A. Yes, this is mine.

Q. You drew that, sir? A. Yes, I did.

Q. For whom? A. For Mr. Mishkin.

Q. Now, I also show you—Do you know approximately when you drew this, sir? A. I would say in the spring of '58.

Q. And were you paid for it, sir? A. Yes, I was.

Q. By whom? A. Mr. Mishkin.

Q. Where, how much, and in what form? A.
1440 Publishers Outlet, twenty dollars apiece, cash.

Q. I show you People's Exhibits 23A and 23B. Can you identify these, sir? A. Yes. They are mine.

Q. You drew them? A. Yes, I did.

Q. For whom, sir? A. For Mr. Mishkin.

Q. Were you paid for them? A. Yes, I was.

Q. In what form? A. Cash.

Q. Where, and how much? A. Publishers Outlet, approximately fifteen or twenty dollars.

Q. And do you recall approximately when you did them? A. Maybe the summer or the fall of '58.

Q. Sir, I show you People's Exhibit 25A and 25B. Can you identify these? A. Yes. They are mine.

Q. You drew them, is that correct, sir? A. Yes, I did.

Q. For whom? A. For Mr. Mishkin.

Q. Approximately when? A. Approximately—These were a set of four—same time as the past one, which was approximately the summer or fall of '58.

Q. Were you paid for them, sir? A. Yes, I was. 1442

Q. By whom, where, how much? A. By Mr, Mishkin, Publishers Outlet, approximately twenty—fifteen to twenty dollars per page.

Q. In what form? A. Cash.

Q. Sir, I show you People's Exhibit 30A; and I ask you if you can identify this?

Justice Breslin: 30A?

Mr. Stein: 30A.

Justice Gassman: "Raw Dames."

Q. Can you identify this? A. It is mine.

Q. You drew that, sir? A. Yes, I did.

Q. For whom? A. For Mr. Mishkin. 1443

Q. Approximately when? A. Fall of '58, in Pub—I gave it to him at Publishers Outlet.

Q. Were you paid for it? A. Yes.

Q. In what form? A. Cash.

Q. About how much? A. Approximately fifteen dollars—approximately ten, fifteen, twenty. All my prices ranged from ten to tweny-five dollars.

Q. From ten to twenty-five dollars for all the work you did for Mr. Mishkin? A. That's right.

Q. Per drawing? A. Per drawing.

Q. I show you People's Exhibit 37A. Can you identify this, sir? A. Yes. It's mine.

Q. Did you draw it? A. Yes, I did draw it.

Q. For whom? A. For Mr. Mishkin, Publishers Outlet. I received twenty-five dollars.

Q. And can you tell us approximately when you did it? A. Yes. I would say this is one of my later ones. Approximately January or February of '59.

Q. I show you People's Exhibit 71A for—71A. Can you identify this, sir? A. Yes. It is mine.

Q. You drew it? A. I drew it.

1445 Q. For whom, sir? A. For Mr. Mishkin. Received payment for it at Publishers Outlet.

Q. In cash? A. In cash.

Q. Now, sir, when you did these drawings for Mr. Mishkin, did you ever have any conversation with him concerning the use to which the drawings were going to be put? A. Yes. They were either used to illustrate books or as covers, as this one is.

Q. Who told you this? A. Mr. Mishkin.

Q. Did you ever read the books relating to the exhibits you have just identified other than 1A through 1L which you say you illustrated? A.

1446 Two books I recall reading and illustrating.

Q. Which books are those, sir? A. "Chances Go Round" and the one that was here. Oh, I can't remember the title.

Justice Breslin: Suppose you step down there—

The Witness: May I?

Justice Breslin: —and see if you can identify the exhibit in question.

The Witness: "So Firm, So Fully Packed".

Q. Will you take that—Pick up that exhibit, please.

Justice Breslin: That is Exhibit?

Court Officer: Twenty-three, Your Honor.

Justice Breslin: Twenty-three. All right.

Q. Now, you say you read that exhibit, is that correct—or book? A. Yes.

Q. And did you do anything else in relation to that book? You did the cover work, is that correct? A. That's right.

Q. You have already testified to that? A. Yes. 1448

Q. Did you do anything else in relation to that book? A. No, nothing. Back cover.

Q. The back cover. Now, sir, you testified earlier that as to People's Exhibit 1A, a book entitled "Chances Go Round", you did a series of twelve illustrations at Mr. Mishkin's request. Did you ever illustrate any other books for Mr. Mishkin? A. Yes, many of them. There are some illustrations that are on covers. "Masque" is my cover.

Q. Did Mr. Mishkin at any other time give you a manuscript and say, "Give me illustrations for this manuscript"? 1449

Mr. Kern: No. Counsel is leading, really testifying here.

Justice Breslin: Don't lead.

Sustained.

Q. Do you recall ever doing any art work for Mr. Mishkin other than covers? A. Other than covers? Yes. Illustrations. To illustrate the "Chances Go Round". That's the only one that I remember getting a manuscript for.

Q. Do you have any recollection of ever having done the illustrations for a manuscript—any

manuscript other than "Chances Go Round"? A. No manuscript.

Q. Do you have any present recollection? A. No, I have no present recollection.

Q. You don't. I show you People's Exhibit 39 and also 67, two books bearing the same title; and I ask you, sir, whether either of these books refreshes your recollection? A. Yes. This—I made a mistake on that one. I am pretty sure now that this was not—this was the one, "Look At Her Motor Turn Over"?

1451 Q. You did not read "So Firm And So Fully Packed"? You did not read that? A. No, I did not read it. It was "Look At Her Motor Turn Over". See, I did so many it is hard to recollect the titles.

Justice Gassman: You say that is the book you read?

The Witness: Yes, I did.

Justice Gassman: But you didn't read "So Firm And So Fully Packed"?

The Witness: No, I am sorry, I didn't. "Look At Her Motor Turn Over" was the book.

1452 Q. Now, this, you state, refreshes your recollection? A. Yes. There are eight illustrations in here I know about.

Q. Did you do these illustrations? A. Yes, I did.

Q. Would you tell us—Did you have a conversation with Mr. Mishkin prior to the time you did those illustrations? A. No. Just—He just hands me the script. I read the script and illustrated various scenes in it.

Q. Did he say anything to you when he handed you the script? A. Yes, he did.

Mr. Kern: Now—All right. Counsel gets one answer in the negative, and then he keeps asking the same question. Evidently—Well, all right.

Mr. Stein: Your Honor, I asked—

Mr. Kern: I will withdraw it.

Justice Breslin: All right.

Mr. Kern: I will withdraw the objection.

Justice Breslin: He did say something to you?

The Witness: Yes. He said, "Make them 1454
sexy," I mean, "so that they would be selling—saleable."

Q. Well, did he tell you what to do with the script? A. Read the script; illustrate the story.

Q. And you state that you drew illustrations for the book, is that right? A. Yes. I picked out—

Q. What did you then do with the illustrations? A. I handed them to Mr. Mishkin.

Q. Were you paid for them? A. Yes, I was paid for them.

Q. Approximately how much? A. Ten dollars 1455
per illustration.

Q. And approximately when did you do this, sir? A. Early '59.

Q. Now, sir, do you have any present recollection—Oh, just one moment. Do you have any present recollection of ever illustrating any other book that you sold to Mr. Mishkin? A. Yes. I illustrated "Sex Switch" for Mr. Mishkin—that wasn't for Mr. Mishkin. It was for another concern, and they turned it out and—

Mr. Kern: Well, I object to anything of this kind, illustrations for some other firm.

Justice Breslin: Illustrations for some other firm? Yes. Sustained.

Q. You illustrated it for some other concern; that's "Sex Switch", is that correct? A. That's correct.

Q. I show you People's Exhibit 40, a book entitled "Sex Switch". A. Yes. That is mine.

Q. Can you identify this book, sir? A. Yes. I drew this.

Q. You drew the—

1457 Justice Breslin: Cover?

Q. —cover? A. The entire cover and the il-illustrations within.

Q. That's a series of cartoons, is that right? A. Series of cartoons.

Q. Or work? A. Yes.

Q. Did you sell that to anyone, sir? A. Er, I sold it to Mr. Mishkin.

Q. You sold it to Mr. Mishkin? A. Yes.

Q. Approximately when did you do so? A. Fall of '58.

Q. Now, Mr. Mishkin did not request this particular book of you, is that correct?

1458

Mr. Kern: I object to Counsel leading the witness.

Justice Breslin: Yes. Don't lead.

Mr. Stein: This is helpful to you, Mr. Kern. I am doing it only in fairness—

Mr. Kern: I don't know whether it is helpful or not, so I object.

Justice Breslin: All right. No, don't lead.

Mr. Stein: All right.

Q. Were you paid for it? A. Yes, I was.

Q. How much? A. Ten dollars per page.

Justice Gassman: That is ten dollars for each illustration?

The Witness: Each illustration.

Q. Now, Mr. Stanton, I show you People's Exhibit 2, a book entitled "Impact"; and I call your attention to the cover of that book and ask you if you can identify it for us? A. Yes. It is my cover.

Q. You drew that cover? A. I drew this cover.

Q. Or you drew a picture from which the cover 1460
was reproduced is that correct? A. That's correct.

Q. And for whom, sir? A. For Mr. Mishkin.

Q. Approximately when? A. Summer of '58.

Q. And were you paid for it? A. Yes, I was.

Q. By whom, sir? A. By Mr. Mishkin.

Q. In what form? A. Cash. Approximately fifteen dollars.

Q. I show you People's Exhibit 3, a book entitled "Female Sultan"; and I ask you to look at that book and see if you can identify any of it for us? A. Yes. The cover is mine.

Q. You drew the cover? A. Cover—the cover, 1461
and—

Justice Gassman: When did you do that?

The Witness: I would say in '59—early '59.

Q. The cover? A. Cover and the illustrations within. There are, 1, 2, 3, 4, 5, 6, 7, 8, 9.

Q. Were you paid for this, sir? A. Yes, I was.

Q. By whom? A. By Mr. Mishkin.

Q. Approximately how much? A. Approximately ten, fifteen dollars per page—per illustration.

Q. Where, and in what form? A. Cash, in Publishers Outlet.

Q. I show you People's Exhibit 5, a book entitled "Her Highness". I call your attention to the cover thereof and ask you if you can identify it, sir? A. Yes. I did the cover.

Q. For whom, sir? A. For Mr. Mishkin.

Q. Approximately when? A. Early part of '59.

Q. Were you paid for it? A. Cash. Twenty-
1463 five dollars.

Q. By whom? A. By Mr. Mishkin.

Q. Where? A. Publishers Outlet.

Q. I show you People's Exhibit 27, a book entitled "Violated Wrestler". I call your attention to the cover thereof and ask you if you can identify that, sir? A. Yes. I did the cover.

Q. For whom, sir? A. Mr. Mishkin.

Q. Approximately when? A. Spring, '59.

Q. Were you paid for it? A. In cash.

Q. By whom? A. By Mr. Mishkin.

Q. Where? A. At Publishers Outlet.

Justice Gassman: How much?

1464 The Witness: Fifteen dollars.

Q. I call your attention to People's Exhibit 69, a book entitled "Woman Impelled"; and I call your attention to the cover thereof and ask you if you can identify this, sir? A. Yes. I did the cover.

Q. For whom, sir? A. For Mr. Mishkin.

Q. Approximately when? A. Done at the same time as the previous cover.

Q. Indicating the book "Violated Wrestler". A. Yes. Approximately the early—

Q. Were you paid for it? A. Yes, I was.

Q. By whom? A. By Mr. Mishkin.
Q. In what form? A. Cash. Fifteen dollars.
Q. Where? A. Fifteen dollars. At Publishers Outlet.

Mr. Stein: You may inquire.

*Cross Examination by Mr. Kern:*

Q. Mr. Stanton, you are still drawing these same type of covers and illustrations, aren't you? A. Yes, I am. 1466
Q. As a matter of fact, you're working right now on— A. Yes, I am.
Q. —on drawings for Newtrix Publishing Company? A. That's correct.
Q. And the drawings which you are making are the very same kind of drawings which you made in connection with these books, isn't that correct? A. That's correct.
Q. Now, Mr. Stanton, it is a fact, according to what you say, that you drew—the purpose of the drawings that you made, covers or illustrations, were to—to make them part of one of these books, is that correct? A. That's correct. 1467
Q. Some books you read for the purpose of determining what illustrations to use? A. Yes.
Q. And how—You couldn't make the illustrations unless you read the text, isn't that so? A. At times I would just hand in drawings to Mr. Mishkin, and he would do with them as—put them on a cover or something.
Q. But you knew they were used for these books? A. Certainly.
Q. There's no question in your mind. You knew that these drawings which you prepared were going to go into the publication of these books? A. Yes.

Q. No doubt about that? A. Yes.

Q. Just as you know that these covers that you are drawing now, and these illustrations that you are drawing now, and which are being sold by Newtrix Company of Jersey City—that is, the drawings themselves—just as you know that those drawings you are now preparing and making go into the—the compilation of a book or a record or the printing or publication of a book or record, and just as you know that those drawings that you are preparing are being sold as
1469 drawings, as such,— A. Yes.

Q. —with no connection with any book, isn't that correct? A. That's correct.

Mr. Kern: That's all. I have nothing else.

Mr. Stein: That's all. Thank you, Mr. Stanton.

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JAMES HARTIGAN, having been called as a
1470 witness, was first duly sworn, and testified as follows:

Court Officer: Name, shield number, and assignment?

The Witness: Detective James Hartigan, H-a-r-t-i-g-a-n, Shield 308, First Deputy Commissioner's Office.

Mr. Stein: One moment, Your Honor.

*Direct Examination by Mr. Stein:*

Q. Detective Hartigan, I call your attention to December 29, 1959. On that date, were you on active police duty, sir? A. I was, sir.

Q. And did you proceed to the premises 254 West 42nd Street, a book store called Publishers Outlet? A. I did.

Q. And what did you do there, sir? A. As a result of an investigation there after certain—

Q. Well, question withdrawn. You proceeded to those premises, is that correct? A. That's correct.

Mr. Stein: I ask that this book be marked People's Exhibit 76 for identification.

1472

Justice Breslin: 76 for identification. Mark it. (So marked.)

Mr. Stein: And I ask that this manila envelope be marked Exhibit 77 for identification.

Justice Breslin: So marked.

Q. Detective Hartigan, I show you People's Exhibits 76 and 77 for identification; and I ask you if you can identify those? A. Yes, sir. On December 29, 1959, I removed these articles from Publishers Outlet Book Store.

Q. Both articles? A. Yes, sir.

1473

Q. Is there anything else you recall concerning People's Exhibit 77 for identification? A. Yes. The contents of People's Exhibit 77 were segregated from a group of other papers and put in the manila envelope by me.

Q. At whose request? A. Yours, sir.

Mr. Stein: You may inquire.

Mr. Kern: I have no questions.

Justice Breslin: Step down.

Mr. Stein: Thank you Detective. Would you bring those exhibits here, please?

1474 *People's Witness, Marilyn Barasch, Direct*

MARILYN BARASCH, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: Be seated. Keep your voice up. What is your name?

The Witness: Marilyn Barasch.

Court Officer: Where do you live?

The Witness: 156-08 Riverside Drive West.

Court Officer: What is your business or occupation?

1475 The Witness: Bookkeeper.

*Direct Examination by Mr. Stein:*

Q. Miss Barasch, by whom are you employed? A. Book Sales, Incorporated.

Justice Gassman: Who?

The Witness: Bookkeeping. Book Sales, Incorporated.

Q. You are a bookkeeper. Where is that located, madam? A. 352 Fourth Avenue.

Q. How long have you been employed there? A. Two and a half years.

1476 Q. What do your duties consist of? A. Well, I handle the bookkeeping, and I also supervise the office.

Q. Have you done that for the past two and a half years? A. Yes.

Q. Now, what sort of a firm is Book Sales, Incorporated? What type of work does it do? A. Wholesale book distributor and publisher.

Q. Now, as part of your duties, madam, do you prepare and supervise the dispatching of invoices for the—or do you receive and process invoices for the purchase of books that your firm may buy? A. Yes, I do.

Q. And do you also handle any book work that's involved subsequent to that time? Is that correct? A. Yes.

Q. Madam, I show you—

Mr. Stein: —I ask that that be marked People's Exhibit 78 for identification.

Justice Breslin: An envelope.

Court Officer: Folder.

Mr. Stein: Folder.

Justice Breslin: Folder, yes, 78.

(Item marked People's Exhibit 78 for identification.) 1478

Q. Madam, I show you People's Exhibit 78 for identification. Would you be good enough to look at that and tell us what it is? A. Those are file copies of invoices.

Q. Sent from whom to whom?

Mr. Kern: Oh, I object.

A. Sent from—

Mr. Kern: I object to that.

Justice Breslin: Yes. Sustained.

1479

Q. What kind of invoices, madam? A. What kind of invoices? Accounts receivable invoices. I don't understand.

Q. From your firm? A. Yes.

Q. And do they relate to any particular customer of yours? A. Yes, they do.

Mr. Kern: I—All right.

Justice Breslin: Go ahead.

Q. Do they relate to any particular customer?

Justice Breslin: She said, "Yes." Next question.

1480 Q. Miss Barasch—

Mr. Stein: —At this time I withdraw from People's Exhibit 77 for identification five sheets which I ask be numbered People's Exhibit 77A through E collectively for identification.

Justice Breslin: All right. So marked. 77A to E, inclusive.

Mr. Stein: Inclusive, yes.

1481 Q. Miss Barasch, I show you People's Exhibit 77A through E for identification; and I ask you whether you can identify these documents? A. Yes.

Q. What are they, madam? A. They are original invoices.

Q. Can you tell us anything else about those invoices, madam?

Mr. Kern: I object to that.

Justice Breslin: Sustained.

Q. Does your handwriting appear on those invoices?

1482 Mr. Kern: I object to that.

Justice Breslin: Overruled. We will take that.

Does it? Yes or no?

A. No.

Q. Are these invoices prepared by your firm? A. Yes, they are.

Q. And are these invoices which were sent—Let me ask you this question: Are these invoices prepared by your firm in the regular course of business?

Mr. Kern: Oh, I object to that. How does she know?

Mr. Stein: She's established that she's the bookkeeper.

Mr. Kern: That's all. She says there's no handwriting of hers there. This is not in compliance with the shop book rule, if that's what Counsel had in mind.

Mr. Stein: What I have in mind, Your Honor, is this: That the witness has just testified that she processes—Oh, excuse me. I asked her whether she processes invoices she receives. 1484

Justice Breslin: Sustained. Proceed.

Q. Mrs. Barasch, as part of your duties at the Book Sales Corporation, do you also process and supervise the processing of sales invoices for sales which the Book Sales Corporation make?

Mr. Kern: I object to that on the ground that the word "process" has no particular meaning at this time. I don't know what Counsel means by "process".

Justice Breslin: Sustained. 1485

Mr. Kern: It might mean—

Q. Mrs. Barasch, as part of your duties at the Book Sales Corporation, do you prepare and send out invoices for the sale of merchandise from Book Sales to other firms?

Mr. Kern: Now, I object to that on the ground that the witness has already stated that there's no writing of hers on that; and that is obviously according to her testimony, a record of the company, not of her own.

Justice Breslin: Suppose she typed it? Overruled.

Mr. Kern: Well, I think—

Mr. Kern: All right. Exception.

Justice Breslin: Answer the question.

A. Occasionally, I do.

Q. And Mrs. Barasch,—

Justice Gassman: Pardon me, Mr. Stein.

Mr. Stein: Yes.

1487 Justice Gassman: You said you were in charge of the office?

The Witness: Yes, I am.

Justice Gassman: How many other employees were there in the office?

The Witness: Four.

Justice Gassman: And what were their duties?

The Witness: Well, each girl has separate duties.

Justice Gassman: Were they bookkeepers, typists, or stenographers?

The Witness: Well, I would have to explain in detail, because they all do a little bit of each,—

1488 Justice Gassman: Well, what—

The Witness: —except stenography.

Justice Gassman: What exactly was your job there?

The Witness: Well, I am a full-time bookkeeper. I also supervise the work and answer any questions that I'm capable of answering.

Justice Gassman: Well, now, when your firm sent out any of the books, I assume that certain invoices were sent either with the books or subsequently to the customers?

The Witness: Yes.

Justice Gassman: Now, who prepared those bills?

The Witness: Well, if you are specifically referring to these bills,—

Justice Gassman: No. Any bills. I am talking now about bills in general sent to people who bought books from your firm?

The Witness: They are billed by a girl on a billing machine.

Justice Gassman: You had an I. B. M. machine there?

1490

The Witness: No. We have a—Right now we have a Burroughs billing machine.

Justice Gassman: Well, at the time in question, what sort of a machine did you use for making the invoices?

The Witness: Well, you have—you have both kinds. Here at the present time—

Justice Gassman: No. I am talking about the time that these papers, these different bills, 77A, B, C, D, and E, were sent out. What sort of a machine did you use in the office in making out invoices?

1491

The Witness: Well, four of them are billed on a—it's kind of continuous form machine. It is all done by handwriting. One of the bills was prepared on the Burroughs billing machine.

Justice Gassman: Now, that machine has a certain roll of paper on which the copies apparently—

The Witness: Yes.

Justice Gassman: —remain in the machine?

The Witness: Yes.

Justice Gassman: And then what happens to those copies?

The Witness: That remain in the machine?

1492 Justice Gassman: Yes?

The Witness: There's one copy that remains in the machine. That copy is taken out and kept in the office until the shipping is completed.

Justice Gassman: Now, where are the entries from those bills made—or where were they made at that time?

The Witness: You mean the entries from the bill?

Justice Gassman: From the copies of the—

1493 The Witness: Into our records in the office.

Justice Gassman: Yes?

The Witness: After the bills are checked, then the posting copies are taped and then posted to a—on a Sens-O-Matic machine to a ledger card.

Justice Gassman: Now, you had a loose-leaf system of ledger cards of all of your customers?

The Witness: No. No. We had—We have a Sens-O-Matic system—Burroughs Sens-O-Matic system. They are trays of cards.

Justice Gassman: Yes?

The Witness: They are not ledged—they are not in a binder.

1494 Justice Gassman: I said loose—loose cards.

The Witness: Oh. I am sorry.

Justice Gassman: Yes.

The Witness: I thought you meant a loose-leaf binder.

Justice Gassman: No. Loose cards.

The Witness: Yes, they are loose cards.

Justice Gassman: And each card contained the name of a customer?

The Witness: That's right.

Justice Gassman: And the copies of the bills were they posted on the debit side of each—

The Witness: That's right.

1495

Justice Gassman: —card—ledger card?

The Witness: That's right.

Justice Gassman: Now, what connection did you have with checking the correctness of these bills?

The Witness: Well, sometimes, when the girl who wasn't able to check them, couldn't do it, I did it.

Justice Gassman: But you didn't check all of them?

The Witness: No, I did not.

1496

Justice Gassman: Now, looking at 77A, B, C, D, and E, can you tell me whether you had any work to do in connection with checking these bills before they were sent out to your customers?

The Witness: I have no way of knowing.

Q. Mrs. Barasch, as part of your duties at the Publishers Outlet—at the Book Sales Corporation you supervised the work of other employees, is that correct? A. That's right.

Q. And is there anyone in the corporation to whom you are answerable? A. Yes.

Q. Who is that? A. To my employers.

1497

Q. And is there anyone other than your employers, or person who pays your salary, to whom you are answerable? And the book work is supervised by you or your employers? A. Well, I do the bookkeeping, and the only supervisor of that would be the accountants.

Q. Mrs. Barasch, are you familiar with the procedure whereby invoices—either purchase or sales invoices, are kept in your place of business? A. I am.

Q. You are clearly familiar with that,— A. Yes.

Q. —is that correct? And whenever you make that—Whenever you make a sale to a given customer, is it the regular course of business of your firm to make out a sales invoice and to send that to the customer, do you know?

Mr. Kern: I object to that. I object to it as to form.

Justice Breslin: Well, overruled.

You may answer.

Mr. Kern: Exception.

1499 A. Er, I'm sorry. I—

Q. Is it the regular course of business of the Book Sales Corporation to prepare and dispatch a sales invoice to any customer to which it makes a sale? A. Yes, it is.

Q. And are those invoices prepared and dispatched in the regular course of business? A. Yes, they are.

Q. And would that be true for all invoices purchased—purchase invoices that the Book Sales Corporation sends to customers— A. Yes.

Q. —sales invoices, rather? Is that true for sales invoices? A. Yes, it is.

1500 Q. I show you—

Justice Gassman: Now, before these invoices are sent out, are they checked for accuracy by anybody?

The Witness: Yes, they are.

Justice Gassman: Now, again I ask you, with respect to 77A, B, C, D, and E, which you have before you, do you know who checked those bills for accuracy, if you know?

The Witness: I have no way of knowing.

Q. Mrs. Barasch, I ask you to look at People's Exhibit 77A through E—77A through E; and I ask you whether, to your knowledge, these particular invoices were prepared and dispatched in the regular course of business? A. Yes, as far as I know.

Q. And is it the regular course of business to prepare and dispatch such invoices? A. Yes, it is.

Q. And to whom were these particular invoices dispatched? A. Which particular invoices? 1502

Q. 77A through E for identification.

Mr. Kern: I object to that. I object to it as reading from a document not in evidence or testifying from a document not in evidence.

Mr. Stein: It is the only way to get the document in evidence.

Mr. Kern: Well, there are other ways if Counsel proceeds properly.

Justice Breslin: The objection is sustained—

Mr. Stein: Your Honor,—

Justice Breslin: —to the last question. 1503

Go ahead.

Mr. Stein: —I offer People's 77A through 77E in evidence subject to further connection.

Mr. Kern: I object to it.

Justice Galloway: Were these bills ever sent out, these invoices, by your employer?

Mr. Stein: Well, Your Honors, let me withdraw my question; and we will do it another way.

Justice Breslin: Well, wait a minute.

Mr. Stein: I am sorry.

Justice Breslin: The judge has a question.

Do you want it answered?

Justice Galloway: Yes.

The Witness: As far as I could see, yes, they were mailed.

Justice Galloway: All right.

Q. Mrs. Barasch, I call your attention again to the folder in front of you, People's Exhibit
1505 77—76—78 for identification. Would you tell us again what this folder consists of? A. It consists of file copies of invoices and file copies of credits and original order forms.

Q. Now, when you say "file copies", madam, what do you mean by that? A. Well, our invoices come in five parts, one part of which is a file copy.

Q. In other words, whenever you send out an invoice—a sales invoice, you keep one copy for yourself? A. Well, we keep more than one copy.

Q. But you keep at least one copy? A. At least one copy.

1506 Q. What you call a file copy. And would that copy, madam, be an exact duplicate of the copy you sent out? A. Yes.

Q. That's what this copy is, of such duplicate sales invoices? A. Yes.

Q. Are these duplicate sales invoices, these file invoices, kept by your firm in the regular course of business? A. They are.

Q. And is it the regular course of business to keep those invoices? A. It is.

Q. Now, I ask you, Mrs. Barasch, to look through People's Exhibit 78 for identification and see whether you can find therein duplicates of

People's Exhibits 77A through E for identification? A. Here is one. Shall I pull it out?

Q. Yes. Please put it together with the one to which it corresponds. Have you found file copies of each of the five exhibits, 77A through E, madam? A. Yes, I have.

Q. And these five copies, just as all the copies within 77 for identification, I take it, are kept in the regular course of business; and it is the regular course of business to keep them; is that correct? 1508

Mr. Kern: Now, if the Court pleases, I have made objection before to the form of the question—I want to make my position clear—when Counsel said "in the regular course of business." Now, that's a situation or a state of fact to be established by Counsel, if he is proceeding under the shop book rule, as I suppose he is. Therefore, using the words "in the regular course of business" implies a conclusion or at least something which is open to discussion as to what is the meaning of "regular course of business". It's simply an opinion of this witness. 1509

Justice Gassman: Mr. Kern, didn't the detective testify that he removed 77A, B, C, D, and E from the Publishers Outlet store?

Mr. Kern: That is correct.

Justice Gassman: Yes.

Mr. Stein: Your Honors, if I may be heard?

Justice Breslin: I think that it has been developed here that when an invoice

1510 was sent out copies of that were kept in that place of business of the book publishers.

Mr. Kern: That is right, Your Honor.

Justice Breslin: How many copies were kept?

The Witness: Two.

Justice Breslin: Is that done at all times whenever an invoice was sent out?

The Witness: Yes.

Justice Breslin: You kept two copies in your

1511 files?

The Witness: Yes.

Justice Breslin: And those are the copies that you have been examining there, your file copies?

The Witness: Yes.

Justice Breslin: Were they produced from your file?

The Witness: Yes.

Justice Breslin: They were?

1512 Mr. Stein: Your Honor, may I just state this generally, because apparently Mr. Kern has made this objection several times and may make it again. It is my position that under the appropriate provision of the Civil Practice Act—I believe Section 374(a)—all I need ask is this: Whether the records were kept in the regular course of business and whether it is the regular course of business to do so.

Justice Breslin: The objection is overruled.

Mr. Kern: I respectfully except.

Justice Breslin: Go ahead.

Q. Now, Mrs. Barasch, as to the five duplicate copies which you said you found—you state you found in the folder you have just examined, People's Exhibit 78, I believe—or 79—

Justice Galloway: The folder is 78.

Q. —78, are those five copies kept in the regular course of Book Sales business? A. They are.

Q. And is it the regular course of Book Sales business to keep those five copies? A. It is.

Q. Now, when you make up such a sales invoice, Mrs. Barasch, do you also make an appropriate entry in any other records? A. We do. 1514

Q. And which records are those, madam? A. Well, after the invoice is checked and the posting copies are taped, they are then posted to the account receivable ledger card.

Q. Go ahead. A. And then a copy of the—when the accounts receivable ledger card is posted, there's a carbon behind it to post the exact same entry into our sales journal; and then the sales journal, at the end of the month, is closed out; and from the sales journal we post it to our general ledger. 1515

Justice Gassman: That's the accounts receivable ledger?

The Witness: Well, the general ledger contains everything—accounts receivable and payable.

Mr. Stein: May I have these three pieces of cardboard marked for identification? 79, 80, and 81 for identification, inclusive.

(So marked.)

Justice Gassman: Mr. Stein, you had Mrs. Barasch look at five copies of the bills taken out from Exhibit 78 for identification—

Mr. Stein: Yes, Your Honor.

Justice Gassman: —and compare them with Exhibits 77A, B, C, D, and E for identification. Do you think you ought to mark those five carbon copies as 78A, B, C, D, and E if you intend to follow through?

1517 Mr. Stein: May we do that and have 78A correspond to 77A?

Justice Breslin: If there is a corresponding one—

Mr. Stein: Well, she has already so testified.

Justice Breslin: —for each one. Well, mark them accordingly.

Justice Gassman: Mark them 78A, B, C, D, and E.

Justice Breslin: 78A through E, inclusive. (So marked.)

1518 Q. Mrs. Barasch, I show you People's Exhibits 79, 80, and 81 for identification—

Justice Breslin: Now, Mr. Stein,—

Mr. Stein: Yes, sir?

Justice Breslin: —before we proceed any further, if I may anticipate, are you trying to establish a further foundation—

Mr. Stein: Yes.

Justice Breslin: —for the receipt of Exhibits 77A through E in evidence?

Mr. Stein: That's correct, Your Honor.

Justice Breslin: Well,—

Mr. Stein: If Your Honor feels it is unneccesary, I will withdraw the offer.

Justice Breslin: Do you want to renew your offer of these in evidence, 77A through E?

Mr. Stein: Yes, I do.

Mr. Kern: I object to them.

Justice Breslin: Overruled. They will be received in evidence,—

Mr. Kern: Exception.

Justice Breslin: —77A, B, C, D, and E. (So marked.) 1520

Mr. Stein: Your Honors,—

Justice Breslin: These exhibits in evidence, 77A through E,—

Mr. Stein: C.

Justice Breslin: —inclusive,—

Mr. Stein: E.

Justice Breslin: —would indicate that certain books in various amounts were sold by Book Sales, Incorporated, to Publishers Outlet at 254 West 42nd Street in the month, apparently, of October, 1958.

Mr. Stein: That's correct. 1521

Mr. Kern: Oh.

Justice Breslin: Wait a minute now. What other purpose have you—What is the probative value of these?

Mr. Stein: Well, as I stated when I offered them, I offer them subject only to connection. These do not relate to the particular titles which are presently in evidence, but by use of certain writing on these documents I intend to show the defendant's connection to the Publishers Outlet store—

Justice Breslin: Oh.

Mr. Stein: —at which a great quantity of books were seized.

Justice Breslin: They are not offered for the purpose of showing that sales were made by this young lady's concern—

Mr. Stein: No, Your Honor.

Justice Breslin: —to the Publishers Outlet?

Mr. Stein: No, Your Honor.

Justice Breslin: I see. All right.

1523

Mr. Kern: Well, I—May I—

Justice Breslin: Well, subject to further connection. The right is reserved to you to move to strike them out, Mr. Kern, if they are not further connected.

Mr. Kern: Thank you very much.

Justice Breslin: All right.

Mr. Stein: Also, Your Honors, since Exhibits 78A through E, inclusive, were used in part as the basis for showing that these were kept in the regular course of business subject to further connection, I think I should offer these in evidence.

1524

Justice Breslin: All right. And you object?

Mr. Kern: I object, Judge.

Justice Breslin: Same ruling. We will take them. Your right is reserved to you to move to strike them out if they are not further connected.

Received in evidence, 78A to E, inclusive. (So marked.)

Q. Well, Mrs. Barasch, at this time—

Mr. Stein: —Your Honors, I withdraw from People's Exhibit 77 for identification a slip of paper. I ask that this be marked People's Exhibit 82 for identification.

Justice Breslin: Do you have any slips there—

Justice Galloway: Are you offering that?

Mr. Stein: I am asking that it be marked 82 for identification.

Justice Gassman: Well, you haven't 1526
reached 81 yet.

Justice Galloway: 78 is the last exhibit.

Mr. Stein: I offered three ledger cards for identification. They were marked, and we subsequently dropped them.

Justice Breslin: They weren't marked.

Mr. Stein: They have been marked for identification.

Justice Breslin: You are withdrawing them?

Mr. Stein: I withdraw their offer for identification.

(Previously marked People's Exhibits 1527
79, 80, and 81 for identification are withdrawn at this point.)

Mr. Stein: I ask that this slip be marked 79 for identification.

Justice Gassman: Is that a folder, Mr. Stein?

Mr. Stein: 79 is a slip of paper—

Justice Gassman: Slip of paper.

Mr. Stein: —removed from People's Exhibit—

Justice Galloway: 77—

Mr. Stein: —77.

Justice Galloway: —for identification.

Mr. Stein: Your Honor, before the reporter marks it, I think it would be better to mark it 77F for identification, since it comes from 77.

Justice Breslin: All right, 77F for identification. (So marked.)

Q. As part of your duties at the Book Sales Corporation, Mrs. Barasch, do you prepare monthly statements for all of your customers?

1529 A. Yes.

Q. And those monthly statements would be a total balance of amounts owing to you, is that correct? A. That's correct.

Q. Are those monthly statements prepared by you in the regular course of business? A. They are.

Q. And is it the regular course of business for you to prepare such monthly statements? A. It is.

Q. I show you People's Exhibit 77F for identification, and I ask you whether you can identify this, madam? A. It is the bottom half—

1530 Justice Breslin: No. Just "yes" or "no".

A. Oh, yes.

Q. What is it, madam? A. The bottom half of the statement.

Q. A monthly statement, is that correct? A. That's right.

Q. And was that monthly statement prepared by your firm? A. Yes, it was.

Q. Prepared in the regular course of business? A. Yes.

Q. And is it—

Mr. Kern: The same objection, if the Court please, as to the form of the question.

Justice Breslin: All right. What was the last question and answer? Would you repeat it, Mr. Stenographer?

Court Reporter: Yes, Your Honor.

Question: "And was that monthly statement prepared by your firm?"

Answer: "Yes, it was."

Question: "Prepared in the regular course of 1532
business?"

Answer: "Yes."

Justice Breslin: All right. Overruled.

Mr. Kern: Exception.

Q. And is it the regular course of business to prepare such things—statements? A. Yes, it is.

Q. That statement was prepared for a particular customer, was it not? A. Yes.

Q. And can you tell from the statement for which customer it was prepared?

Mr. Kern: I object to that.

Justice Breslin: Sustained. 1533

Justice Galloway: Why don't you offer it?

Mr. Stein: I offer this in evidence as 77F subject to further connection.

Justice Breslin: Do you object?

Mr. Kern: I would like to see it, if the Court please?

Justice Breslin: Show it to Counsel.

Justice Gassman: Was this paper, Mr. Stein, removed from 77—

Mr. Stein: Yes, it was, Your Honor.

Justice Gassman: —for identification?

Mr. Stein: That's correct.

Mr. Kern: Well, I object to this, if the Court please, on the ground that it is irrelevant and incompetent, absolutely immaterial. It has no bearing upon the issues in the case, no relationship to this defendant. It is not connected with the defendant.

Justice Breslin: I think there was some testimony that the item, together with others, was removed by a detective from

1535 a place of business—

Mr. Stein: That's correct, Your Honor.

Justice Breslin: —which you claim was this defendant's place of business.

Mr. Kern: Oh, there has been no testimony—

Justice Breslin: Yes.

Mr. Kern: Yes?

Justice Breslin: Publishers Outlet.

Mr. Kern: That hasn't been established at all. And this is—the name "Publishers Outlet" is on this piece of paper, but that

1536 isn't binding upon this defendant.

Justice Breslin: Well, objection—

Justice Galloway: He is going to, supposedly, connect this, Mr. Kern.

Mr. Kern: Oh, this is all part—

Justice Galloway: Is that correct?

Mr. Kern: Subject to connection.

Mr. Stein: That's correct, Your Honor.

Justice Galloway: Yes.

Mr. Kern: All right.

Justice Galloway: Subject to your motion to strike.

Mr. Kern: Yes.

Justice Breslin: You have the same ruling, and you have an exception.

Mr. Kern: Thank you.

Justice Breslin: The right is reserved to you to strike it out if it is not properly connected.

(People's Exhibit 77F received in evidence and so marked.)

Q. I ask you to look at People's Exhibit 77F in evidence, Mrs. Barasch; and can you tell us the customer to which that was sent? A. Yes. 1538

Q. What's the name of the customer, Mrs. Barasch? A. Publishers Outlet.

Justice Gassman: Doesn't the paper speak for itself?

Mr. Stein: All right.

Q. What address?

Mr. Kern: There is no address.

A. There is no address on this piece of paper.

Q. Mrs. Barasch, when you make purchases from a given customer, do you prepare purchase invoices? 1539

Mr. Kern: I object to that.

Mr. Stein: I wish to establish a procedure, Your Honor.

Justice Breslin: Overruled.

Justice Galloway: Does she prepare it? —is that what you asked?

Justice Breslin: Overruled. You may answer.

Q. Do you prepare purchase invoices? A. Occasionally.

Q. And if you don't prepare them personally, do you supervise the preparation of such invoices? A. Of a purchase invoice?

Q. Yes? A. No.

Justice Gassman: Mr. Stein, excuse me for interrupting you.

I'm going back to 77F in evidence. In whose handwriting do the words "Publishers Outlet" appear there?

The Witness: That's my handwriting.

1541 Justice Gassman: Your handwriting. And was that on there at the time this statement was sent out?

The Witness: It was not.

Justice Gassman: Well, when did you put it on there?

The Witness: When it was received.

Justice Gassman: When it was received by whom?

The Witness: Books Sales.

Justice Gassman: Well, you sent that out to Publishers Outfit, didn't you?

1542 The Witness: Publishers Outlet.

Justice Gassman: Outlet. You sent it out to them?

The Witness: Yes, but it must have come back in the mail.

Justice Gassman: Well, do you know what name, if any, was on there at the time it was sent out?

The Witness: Without checking it against the invoice numbers, I couldn't say positively, no.

Justice Gassman: Well, have you any idea when it came back into your possession?

The Witness: No.

Justice Gassman: Do you know when you put the words "Publishers Outlet" on there?

The Witness: Not without checking, no.

Q. Mrs. Barasch, when you send one of these originals out, does the original come back to you? A. Usually the top half is returned.

Q. The top half? A. That's right.

Q. Well, do you have the top half of this? A. We might. I don't know.

Q. This is the bottom half, though, is it not? A. That's the bottom half. 1544

Q. Then why do you say this came back to you?

Mr. Kern: Oh, no, if the Court pleases, I object.

Justice Breslin: Yes, sustained.

Mr. Stein: All right. No further questions.

Mr. Kern: And may I move now, even at this point, to strike that, because I think this testimony is absolutely—

Justice Galloway: Is this 77F?

Mr. Stein: This is 77F, Your Honor. 1545

Justice Galloway: Now, it was my understanding that 77F—or 77, was a folder that was seized up in the book store, was it?

Mr. Stein: May I just make—

Justice Galloway: Well, no. Answer that.

Mr. Stein: It's not a folder. The contents of a folder were seized at the book store.

Justice Galloway: All right. And that was what book store?

Mr. Stein: Publishers Outlet, 254 West 42nd Street.

Justice Galloway: Now, this lady says that this was mailed back to her firm?

Mr. Stein: That's correct, Your Honor; and that is the reason for which I have asked an additional question, because we have had testimony that this was found at 254 West 42nd Street. In response to a question, the witness states, "It was mailed back to me."

1547 Justice Breslin: All right, pursue it.

Q. Mrs. Barasch, you say that formerly the top of a document was mailed back to you, is that correct? A. That's right.

Q. Yet you testified before that the bottom must have been mailed back to you. Now, why do you say that? A. Well, this is just what I think might have happened: That this whole statement was returned with a check,—

Q. Yes? A. —and because of the fact that there is a notation down here which would require checking, the top half was left with the
1548 check and the bottom half was removed to have it checked, to see what the problem was that there that was writing on it.

Justice Breslin: Would that be returned to the customer?

The Witness: No, it would not.

Justice Breslin: How do you account for that being out of your possession?

The Witness: I can't.

Justice Breslin: You can't.

Mr. Kern: Well, may I again move to strike this out on the ground—

Justice Breslin: Strike it out.

Mr. Kern: —on the ground this is hardly satisfactory.

Justice Galloway: Strike it out.

Q. Now, Mrs. Barasch, you are the bookkeeper for the Book Sales Corporation, is that correct? A. Yes.

Q. And you are also the office manager, is that correct? A. Yes.

Q. Is it the regular course of the Book Sales Corporation to prepare purchase invoices for 1550
books which it buys? A. Occasionally. It's not the regular course of business to prepare purchase invoices.

Q. Should the Book Sales Corporation have bought certain books and then shipped some of those books back to the person from whom the books had been purchased, would it be the regular course of the business of the Books Sales Corporation to prepare and dispatch to that customer a debit memo?

Mr. Kern: Now, I object to this. This is supposition upon supposition. 1551

Justice Breslin: Sustained.

Q. Does the Books Sales Corporation keep records of books which it purchases? A. Yes.

Q. Does the Book Sales Corporation keep records of returns it makes on books it has purchased and wishes to send back to the purchaser? A. Yes.

Q. What sort of records does the Book Sales Corporation—

Justice Galloway: To the purchaser?

Mr. Stein: To the seller.

Justice Galloway: All right. Let's get it right, please.

Q. To the seller. What sort of records does it keep? A. Prepares a debit memo.

Q. And is that debit memo prepared in the regular course of business? A. Yes, it is.

Q. And is it the regular course of business to prepare such a debit memo? A. Yes.

Mr. Stein: I ask that these two pieces of paper be marked People's Exhibits 80
1553 and 81.

Justice Breslin: These are more papers taken from the premises in question?

Mr. Stein: 79 and 80, Your Honor.

Justice Breslin: What?

Mr. Stein: 79 and 80.

Justice Galloway: 79 and 80.

Justice Breslin: Were these papers taken from the envelope?

Mr. Stein: No.

Justice Breslin: They were not taken from the envelope?

1554 Mr. Stein: No.

Justice Breslin: These are something new?

Mr. Stein: That's correct.

Justice Breslin: 79 for identification and and 80 for identification. (So marked.)

Q. Mrs. Barasch, I show you People's Exhibits 79 and 80 for identification; and I ask you if you can identify these? A. Yes. Those are debit memos.

Q. Does your signature—Does your writing appear anywhere on this debit memo? A. My initials do.

Q. Do they appear on each debit memo? A. Yes.

Q. Were these debit memos prepared in the regular course of business? A. They were.

Q. Is it the regular course of business of your firm to prepare such debit memos? A. Yes.

Mr. Stein: I offer these debit memos in evidence as 79 and 80.

Justice Breslin: Show them to Mr. Kern.

Mr. Kern: I object to these on the 1556
ground that the proper foundation for the receipt of these papers in evidence has not been laid.

Justice Breslin: Were those produced from your file?

The Witness: I would imagine so, yes.

Mr. Kern: The witness said, "I imagine so."

Mr. Stein: The witness testified her initials appear there, Your Honor, and that, to her knowledge, she sent these out in the regular course of business. 1557

Justice Breslin: We will overrule your objection.

Mr. Kern: Exception.

Justice Breslin: Received in evidence as People's Exhibits 79 and 80.

Justice Galloway: 79 and 80.

(So marked.)

Justice Breslin: All right, go ahead.

Q. Do you recall, Mrs. Barasch, from the time you looked at those memos whether the names of the persons to whom you had sent them—the firm to which you had sent them appeared on

the debit columns— A. Excuse me, Mr. Stein, but, to my knowledge, those things weren't mailed out.

Q. What happened— A. Those are my copies, because they have my entry number on them.

Q. When you prepare—Are those original copies? A. Yes.

Q. These would have been retained in your files, is that correct? A. Yes, because they are stamped that way.

1559 Q. And how many copies of this would you have prepared? A. Two.

Q. And what would you have done with the second or duplicate copy? A. It depends. Sometimes the original is mailed out, and I keep the carbon copy for my records.

Q. Duplicate. Yes? A. And sometimes I keep the original and keep the copy. And sometimes they are separated.

Justice Gassman: Pardon me. Which is the ribbon copy, the black or the red?

The Witness: Which is type—

Justice Gassman: The original?

1560 The Witness: That is the original there.

Justice Gassman: How about the one that is in red? Is that a carbon copy?

The Witness: No. That's also an original.

Justice Gassman: I see.

Q. Now, Mrs. Barasch, your initials appear on those, is that correct? A. Yes.

Q. That would indicate that you sent it out or kept it, which? A. That the contents and addition is correct.

Q. Would you sometimes send out the ones that you initial? A. Never.

Q. You would, therefore, keep the ones with your initials? A. That's right.

Q. Therefore, these two exhibits are exhibits which you retained, is that correct? A. That's right.

Q. What would you do with the carbon copy, madam? A. There is no general rule for it.

Q. You have two copies, is that correct? A. That's right.

Q. One copy you have a general rule in that you always retain it, is that correct? A. That's usually the carbon copy. 1562

Q. Well, regardless of which copy it is, madam, you have only two copies, is that correct? A. That's right.

Q. And you retain one always, is that correct? A. Yes.

Q. And what do you do with the other? A. Well, the other one may have been with the check for the final payment.

Q. No. What do you do with the other one? Do you keep the other one? A. Well, if it is not mailed out, it is kept with this one.

Q. Would it sometimes be kept by you? A. Yes. 1563

Q. Now, when you retain one yourself, you retain it in the regular course of business, is that correct? A. Yes.

Q. And these bear your initials, is that correct? A. Yes.

Q. Therefore, you retained them in the regular course of business, is that correct? A. Yes.

Q. And they are debit memos, is that correct? A. That's right.

Q. Are books listed in those debit memos? A. Yes.

Q. What would that mean that you did with the books which appear in the debit memos? A. The books were returned.

Q. And if you return books to a particular customer, would that mean anything else about those books?

Justice Gassman: Would you deduct the amount of the return when you finally paid for those books?

The Witness: That's right.

1565 Justice Gassman: Isn't that what you are driving at?

Mr. Stein: Not exactly, Your Honor.

Justice Gassman: Well, then, I am trying to follow you, and I can't.

Q. If you return books to a particular customer, would that mean that you had bought books from that customer? A. Yes.

Q. And these debit memos bear the name of what customer, madam? A. Mr. Mishkin.

Q. Edward Mishkin. Are you familiar with Mr. Mishkin? A. I met him a few times.

1566 Q. Do you see him in the courtroom? A. Yes.

Q. Is that the gentleman seated next to Mr. Kern? A. Yes.

Mr. Stein: The gentleman I am pointing to, indicating the defendant.

Q. You have seen him a few times before. Where? A. In Book Sales.

Q. Any place of business? Where, madam? A. I don't know.

Q. Did you ever send any items to a store by the name of the Publishers Outlet Company?

A. Have we ever shipped merchandise to Publishers Outlet?

Q. Yes? A. Yes.

Q. Have you ever shipped merchandise to Mr. Mishkin? A. Well, we must have, because of the debit memo.

Q. And what was the address to which the merchandise was sent? A. There is no address on it.

Q. Where would you ship merchandise when you shipped it to Mr. Mishkin? Do you know? 1568
A. I don't know. I don't handle the shipping.

Q. Do you have any knowledge at all or any recollection of—any knowledge of—just think for a moment—of any place of business Mr. Mishkin may have to which you sent merchandise?

Mr. Kern: Now, I object to—

Mr. Stein: I withdraw the question.

Question withdrawn.

Justice Breslin: All right.

Justice Galloway: Mrs. Barasch, when you send back these books—or when you send books back to any book store, wouldn't you send a 1569
debit memo with them? How would the fellow know what he was getting back?

The Witness: You mean when we returned books to a publisher?

Justice Galloway: Yes?

The Witness: Yes. Usually there is a pink copy.

Justice Galloway: Well, you just told us there was only two copies.

The Witness: Well, on this there was only two copies. I was given a list from a slip of paper of the books which I typed up on an original and a copy.

Justice Galloway: Well, is the copy a pink one?

The Witness: No. The copy is blue. We—You asked me, in the orderly course when we send books back to a publisher—

Justice Galloway: Yes.

The Witness: —how is it done? Well, usually what's done is there's an original, a blue copy, and a pink copy.

Justice Galloway: Well, then there's an original and two copies—

1571 The Witness: That's right.

Justice Galloway: —not two copies in all?

The Witness: And the pink copy acts as a packing slip and goes back with the books.

Justice Galloway: That's right. That is what I want to find out.

Q. Mrs. Barasch, when you sent out a debit memo, do you make any additional entry in any of the books you keep? A. Yes.

Q. Which books are those, madam? A. In the purchase journal and in the accounts payable ledger sheets.

1572 Q. The accounts payable ledger sheets. And are your accounts payable ledger sheets—accounts payable ledger sheets of the Book Sales Corporation kept in the regular course of business? A. They are.

Q. And, madam, is it the regular course of business of the Book Sales Corporation to keep such accounts payable ledger sheets? A. It is.

Q. Do you have with you, madam, the accounts payable ledger books of the Book Sales Corporation for the period of August, 1957, to March, 1958? A. From August, '57, to March of '58, yes.

Q. Yes? A. Yes.

Mr. Stein: I ask that this document be marked People's Exhibit 81 for identification.

Justice Breslin: All right, it will be so marked, 81 for identification.

(So marked.)

Q. I show you People's Exhibit 81 for identification, Mrs. Barasch, and I ask you whether you can identify this document? A. Yes.

Q. What is it, madam? A. It is an accounts payable ledger sheet. 1574

Q. And is this a ledger sheet which you turned over to me when you testified in the Grand Jury? A. Yes.

Q. And was that ledger sheet taken from the accounts payable ledger books which are currently before you? A. Yes.

Mr. Stein: I offer this ledger sheet in evidence.

Mr. Kern: For what period is it?

Justice Breslin: March, '57—

Mr. Stein: No. August of '57 through—

Justice Breslin: March of '58. 1575

Mr. Stein: —March of '58.

Mr. Kern: I object to it on the ground that it is not within the scope of the issues in the case as defined by the information.

Mr. Stein: May I have the debit memos?

Justice Gassman: The debit memos are dated December 10th—

Mr. Stein: Oh, I believe this extends beyond—

Q. —what is the period of time covered by this ledger sheet, madam? A. Well, this ledger

sheet came from the book—well, this particular ledger sheet covers from August 1, 1957, to October, 1958.

Q. I'm sorry. No. Pardon me. Until December, 1958.

Q. All right.

Justice Breslin: Your objection is overruled. We will take it. That is People's Exhibit—

Justice Gassman: 81.

1577 Justice Breslin: —81.

(So marked.)

Q. Mrs. Barasch, did you make entries in People's Exhibit 81 which reflect the debit memos sent out, People's Exhibits 79 and 80? A. I did.

Justice Gassman: May I see 81, if you are through with it, please?

Mr. Stein: Yes, your Honor.

Mr. Kern: These, of course, are subject to my motion to strike—

Justice Breslin: Yes.

1578 Mr. Kern: —if they are not connected with the defendant?

Justice Breslin: Yes.

Mr. Kern: Thank you, your Honor.

Justice Gassman: Mrs. Barasch, looking at People's Exhibit 81, the account there is Edward Mishkin.

The Witness: Yes.

Justice Gassman: Isn't it customary to put the address of a customer or person that you buy merchandise from?

The Witness: Not on the accounts payable ledger sheet.

Justice Breslin: Where do you keep that data?

The Witness: The address?

Justice Breslin: Yes?

The Witness: On the original invoice.

Justice Breslin: On the original invoice.

Q. How about the debit memo, Mrs. Barasch? A. It is usual to put an address, but there is no address on these.

Q. It wasn't done in these instances, is that right? A. No. 1580

Q. Mrs. Barasch, debit memos are made out to whom?

Justice Gassman: They speak for themselves. They are made out to Mishkin.

Justice Galloway: They speak for themselves.

Mr. Stein: Mr. Kern stated before—he asked whether or not these had been accepted subject to further connection; and I believe your Honors stated, "Yes."

Justice Breslin: Yes.

Mr. Stein: I submit at this time that I 1581
have connected these all that I intend to, in that these debit memos are made out to Mr. Mishkin. The witness has testified that any title which appears on the debit memo is a book previously purchased from the seller whose name appears on the debit memo; and several of the books listed on the debit memo are the same titles as the books which are currently in evidence.

Justice Breslin: Well, suppose we take a rest for a few minutes. Give you a chance to look them over. Five-minute recess.

1582 *People's Witness, Marilyn Barasch, Cross*

MARILYN BARASCH retakes the witness stand:

Court Officer: Be seated, please. You are still under oath.

Mr. Stein: I have completed my examination of this witness.

Mr. Kern: Well, just—

*Cross Examination by Mr. Kern:*

1583 Q. Miss Barasch, do you know anything about the titles of books which are purchased by Book Sales? A. Anything about them?

Q. Yes. A. What do you mean?

Q. Well, do you know whether those books which you purchased, or purchased by you for resale to others— A. I, myself, don't purchase books. Do you mean for the company—the company?

Q. But you know there are books—well, these —did you ever see any of these titles around in your place of business—"European Brothels," "Eyewitness," "Fury," "Naked Paradise," "Catonis"? A. No, I have never seen the books.

1584 Q. Are there books in your place of business? A. Yes.

Q. In the storerooms? A. Yes.

Q. You don't know where these books go, where they are sent, who buys them? A. No. I mean, I only know from what the invoices show.

Mr. Kern: That's all.

Mr. Stein: Thank you, Mrs. Barasch.

Justice Breslin: One question. Who does the purchasing of books in your concern?

The Witness: My employers.

Justice Breslin: Who are they?

The Witness: Mr. Lieberman and Mr. Housner.

Justice Breslin: Mr. Lieberman—

The Witness: Yes.

Justice Breslin: —and Mr. Housner?

The Witness: (Nods affirmatively.)

Justice Breslin: All right, step down.

Q. Is Mr. Housner coming here, if you know, or Mr. Lieberman? A. Mr. Lieberman is upstairs. 1586

Mr. Kern: All right.

Mr. Stein: Thank you, Mrs. Barasch.

The Witness: I can go?

Justice Breslin: Yes.

The Witness: Do you want me to take these?

Mr. Stein: I won't have any need for these, so you can take them, with the exception of this exhibit. Can you carry them, or would you like some help?

The Witness: I would like some help to take them back upstairs.

Mr. Stein: Now, if your Honors please, 1587
Mr. Lieberman, the employer of the last witness, is here. I do not intend to call him. If Mr. Kern desire to call him, I will keep him here; otherwise, I may as well send him home.

Mr. Kern: Yes, I would like to have him. We prefer Mr. Housner.

Mr. Stein: Well, I imagine there are forms of processes you can use, Mr. Kern.

Mr. Kern: All right. I suppose so. All right. You will have him back when we want him, Mr. Stein?

1588 *People's Witness, Gene Bilbrew, Direct*

Mr. Stein: Do you want Mr. Lieberman today?

Mr. Kern: Do you want to call him as your witness?

Mr. Stein: No.

Mr. Kern: I don't know when you will finish your case.

Mr. Stein: Eugene Bilbrew.

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1589 GENE BILBREW, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: All right. Be seated. Keep your voice up. What is your name?

The Witness: Gene Bilbrew, B-i-l-b-r-e-w.

Court Office: Home address?

The Witness: 201 West 87th Street.

Court Officer: Business or occupation?

The Witness: Commercial artist.

Justice Gassman: You are what?

The Witness: Commercial artist.

1590 Justice Gassman: Your first name is what?

The Witness: Gene, G-e-n-e, Bilbrew, B-i-l-b-r-e-w.

*Direct Examination by Mr. Stein:*

Q. Mr. Bilbrew, how long have you been a commercial artist? A. Approximately ten years.

Q. I will ask you, Mr. Bilbrew, if you would please speak up so that I can hear you at the point I am standing at? And have you gone to any school for art? A. Cartoonists', illustrators' school.

Q. Approximately when was that, sir? A. '56, '57.

Q. Please do try to raise your voice. A. All right.

Q. Do you know the defendant in this case—Edward Mishkin? A. I do.

Q. When did you first meet him, sir, approximately? A. '54, '55.

Q. And have you ever done any work for him, sir? A. I have.

Q. What kind of work, sir? A. Book covers. 1592

Q. I show you People's Exhibit 4-A, sir, and I ask you whether you can identify this? A. That's my drawing.

Q. What? One of yours? A. Yes, it is.

Q. What do you mean by that, sir? Did you draw it? A. Yes, I did.

Q. And for whom did you draw it, sir? A. Eddie Mishkin.

Q. Approximately when? A. Maybe '56, maybe '57.

Q. And were you paid for it, sir? A. I was.

Q. By whom? A. Eddie Mishkin.

Q. Where were you paid? Do you recall? A. 1593 I believe in the book store.

Q. Which store would that be, sir? A. Publishers Outlet.

Q. And how much were you paid, sir? A. I beg your pardon?

Q. How much were you paid?

Mr. Kern: I didn't hear the answer.

Justice Breslin: Publishers Outlet.

Mr. Kern: No. The answer he made to the question before that.

Justice Breslin: At the book store.

Mr. Kern: At the book store.

Q. And approximately how much were you paid, sir? A. About twenty-five dollars.

Q. In cash or by check? A. Cash.

Q. I show you People's Exhibit 24-A, and ask you whether you can identify this? A. I can identify it.

Q. What is that, sir? A. Drawing I made.

Q. For whom, sir? A. Eddie Mishkin.

Q. Do you know approximately when? A. No, I couldn't say that.

1595 Q. Do you recall at all, if you can, the approximate date, to the best of your recollection, sir? A. That I would be unable to do.

Q. You would be unable to give that?

Justice Gassman: What?

The Witness: That I would be unable to do. I don't know exactly when I did the drawing.

Justice Gassman: Can you speak louder, please?

The Witness: Yes, I can.

Justice Gassman: All right.

1596 Q. Do you know, sir, whether you did it within the past two years or not? A. Maybe '57, '58.

Q. And were you paid for it, sir? A. Yes, I was.

Q. By whom, sir? A. Eddie Mishkin.

Q. Where, in what form, and approximately how much? A. At the book store and in cash.

Q. I show you—

Justice Gassman: How much—

Justice Breslin: How much?

Justice Gassman: —did you get?

Q. How much did you get, sir? A. About twenty-five to thirty dollars.

Q. I show you People's Exhibit 26-A, and I ask you whether you can identify this, sir? A. I can.

Q. What is it, sir? A. A drawing I made for Eddie Mishkin.

Q. Approximately when, if you can recall, to the best of your recollection? A. I can't recall exactly when.

Q. About when, as best as you can recall? A. '56, '57.

Q. And were you paid for it? A. I was. 1598

Q. By whom, in what form, how much? A. By Mr. Mishkin, in cash.

Q. Where and how much?

Justice Gassman: How much?

The Witness: Twenty-five, thirty dollars.

Q. And about where? A. I beg your pardon?

Q. Where? A. At the book store.

Justice Breslin: When you say "the book store," what book store are you referring to?

The Witness: Well, I suppose it's Publishers Outlet, the book store on 42nd Street.

1599

Q. Now, sir, don't tell us what you suppose. Where do you recall being paid for that? A. Book store on 42nd Street.

Q. And were you paid personally by the defendant? A. By Mr. Mishkin.

Q. All right. I show you People's Exhibit 28-A; and I ask you whether you can identify this? A. I can.

Q. What is that, sir? A. A drawing I made for Mr. Mishkin.

Justice Gassman: What exhibit was that?

Justice Galloway: 28-A.
Mr. Stein: 28-A.

Q. And to the best of your recollection, when did you do that? A. I guess I would say in the same year, either '56 or '57.

Q. And for whom? You stated you did it for Mr. Mishkin. Were you paid for it? A. Yes, I was.

Q. How much were you paid? A. Twenty-five dollars cash.

Q. And where? A. At the book store.

Q. I show you People's Exhibit 29-A, sir, and ask you if you can identify that? A. I can.

Q. What is that, sir? A. Drawing I made for Eddie Mishkin.

Q. Approximately when, to the best of your recollection? A. '56, '57.

Q. And were you paid for it? A. In cash.

Q. By whom? A. Eddie Mishkin.

Q. And where? A. At the book store.

Q. How much? A. Twenty-five dollars.

Q. I show you People's Exhibit 60-A, and ask you whether you can identify that? A. I can.

Q. What is that, sir? A. Drawing I made for Mr. Mishkin.

Q. Approximately when? A. About '57.

Q. And were you paid for it? A. I was.

Q. By whom? A. Mr. Mishkin.

Q. Where? A. At the book store.

Q. How much? A. Twenty-five dollars.

Q. In what form? A. In cash.

Q. I show you People's Exhibit 70-A. I ask you if you can identify this? A. I can.

Q. What is it, sir? A. A drawing I made for Eddie Mishkin.

Q. Approximately when? A. '57.

Q. Were you paid for it? A. I was.
Q. By whom? A. Mr. Mishkin.
Q. How much? A. Twenty-five dollars.
Q. In what form? A. In cash.
Q. And where? A. At the book store.
Q. And I show you—

Justice Galloway: You keep mentioning "the book store." Was it always the same store?

The Witness: No. Once I was paid on 49th Street and Broadway, I believe.

Justice Galloway: No. But whenever you talk 1604
about "the book store," was it always the same book store?

The Witness: Yes.

Justice Galloway: All right.

Justice Breslin: You mentioned 49th Street and Broadway. What sort of a place were you at when you were paid?

The Witness: What sort of a place was I at?

Justice Breslin: Yes.

The Witness: Well, it is a book store.

Justice Breslin: In the street? In the street?

The Witness: No. Inside the book store. 1605

Justice Breslin: At 49th and Broadway. What is the name of that book store?

The Witness: That I can't recall.

Justice Breslin: That woudn't be the Main Stem Book Store, would it?

The Witness: I believe I—I believe that's it.

Justice Breslin: I see. Whom did you see there at the Main Stem Book Store?

The Witness: Mr. Mishkin.

Q. I show you People's Exhibit 72-A, sir, and ask you whether you can identify that? A. I can.

Q. What is that, sir? A. Painting.

Q. Did you do it? A. I did.

Q. For whom? A. Mr. Mishkin.

Q. Approximately when, sir? A. '56.

Q. And were you paid for it? A. I was.

Q. By whom were you paid? A. Mr. Mishkin.

Q. Where did he pay you? A. At the book store.

Q. Which book store, sir, do you recall? If you recall— A. Publishers Outlet.

1607 Q. And that's a store on West 42nd Street, is that correct? A. Right.

Q. And in what form were you paid? A. Cash.

Q. And how much were you paid? A. Twenty-five dollars.

Q. By the defendant? A. Yes.

Q. I show you People's Exhibit 22, a book; and I call your attention to the cover of that book and ask if you can identify that cover? A. I can.

Q. What is it, sir? A. A cover I made for Mr. Mishkin.

1608 Q. Approximately when, sir? A. '56, '57.

Q. And were you paid for it? A. I was.

Q. By whom? A. Mr. Mishkin.

Q. Where? A. At the book store.

Q. On 42nd Street or 49th? A. 42nd Street.

Q. In what form? A. Cash.

Q. How much? A. Twenty-five dollars.

Q. I show you People's Exhibit 35 and call your attention to the cover of that book and also—

Justice Gassman: Thirty what?

Mr. Stein: Thirty-five and 36.

Justice Gassman: Five.

Q. Do you have both 35 and 36 there? I call your attention to the covers of those two books and ask you whether you can identify them? A. I can.

Q. What are they, sir? A. Covers I made for Mr. Mishkin.

Q. Approximately when, sir? A. '55, '56.

Q. And were you paid for them, sir? A. I was.

Q. In what form, sir? A. Cash.

Q. By whom? A. Mr. Mishkin. 1610

Q. How much? A. Twenty-five.

Q. Each? A. Yes.

Justice Breslin: Let me see those two exhibits.

Q. And where were you paid, sir? A. Book store on 42nd.

Q. I show you People's Exhibit 70, a book, and call your attention to the cover of that book. I ask you, sir—I believe you have already identified that drawing.

Justice Gassman: He already identified 70-A. 1611

Mr. Stein: Withdrawn.

Q. Now, sir, prior to the times that you made the drawings for Mr. Mishkin which you already identified, did you ever have any conversation with Mr. Mishkin concerning those drawings? A. Not as I can recall.

Q. Well, would you ever talk to Mr. Mishkin before you did a drawing? A. I would merely ask him did he need a cover.

Q. And would you tell us what procedure you would follow thereafter? A. I would make up the cover and bring it down to Mr. Mishkin.

Q. Now, I have shown you several exhibits, both drawings and certain books, sir. For the exhibits I have shown you, sir, did Mr. Mishkin ever give you the book for the exhibit? A. On occasions.

Q. For the exhibits I have shown you, did he ever do that, sir? A. I can't recollect.

Q. Well, then, I will ask that you look at the exhibits again, sir, People's Exhibit 4-A.

Mr. Stein: Would you show the witness
1613 People's Exhibit 4, sir—4.

Q. Did you read that book, sir? A. Did I read this book?

Q. Yes? A. No, I haven't.

Q. Prior to the time you did the drawing? You did not? A. No.

Q. People's Exhibit 24. Did you read that prior to the time you did the drawing? A. No.

Q. Or at any time? A. No.

Q. People's Exhibits 26, 28 and 29? Did you ever read those prior to the time, or at any
1614 time, you did the drawings? A. No, I did not.

Q. People's Exhibit 34. Did you ever read that, sir? A. No, I did not.

Justice Breslin: Did you ever read any manuscripts before you made any of these drawings at the request of Mr. Mishkin?

The Witness: I believe on one occasion Mr. Mishkin gave me a manuscript to—

Justice Breslin: Do you recall the title of it?

The Witness: No, I do not.

Justice Breslin: No.

1615

Q. Only on one occasion, sir? A. Well, I can't exactly say that it was just one occasion or—

Mr. Stein: I am sorry, Judge.

Justice Breslin: Did you just do cover work?

The Witness: That was about the size of it, just the cover work.

Q. I show you People's Exhibits 60, 70 and 72, sir. Did you ever read these books, sir? A. No, I did not.

1616

Q. And, sir, I show you People's Exhibits 22, 35, and 36—no, not 35 and 36—22 and—only 22. Did you read that, sir? A. No, I did not.

Justice Gassman: Well, tell me: How did you know what to put on the cover if you didn't read the book?

The Witness: I just drew it up.

Justice Gassman: Well, did anybody tell you what sort of a cover was wanted on there? What sort of a picture was wanted on there?

The Witness: No. I have studied various covers of these different books.

1617

Justice Gassman: You have studied what?

The Witness: The covers.

Justice Gassman: Now, as you made these covers that you testified to, did you have any conversation with anybody before you started to draw the covers?

The Witness: No, I did not.

Justice Gassman: Well, how did you know what sort of a cover to put on this without reading the book?

The Witness: Well, let's say I would—I, more or less, learn the psychology of the type of work, what's appealing—

Justice Gassman: Psychology of what type of work?

The Witness: The work that's here.

Justice Gassman: But you didn't read the book. How did you know that the cover was going to fit the book?

The Witness: Actually speaking, I didn't.

Justice Gassman: You just made a cover without knowing whether it fitted the book or it didn't fit the book?

1619 The Witness: That's the way I have been working.

Justice Gassman: And you say that Mr. Mishkin paid you for it?

The Witness: That's correct.

Q. Now, sir, I show you again People's Exhibit 26-A. Do you know, sir, whether this particular drawing has anything to do with this book—the book involved? A. No, I couldn't say.

Q. What you did was make a drawing and offer it to Mr. Mishkin— A. That was it.

Q. —a drawing of a female? A. Correct.

1620 Mr. Stein: You may inquire.

*Cross Examination by Mr. Kern:*

Q. Mr. Bilbrew, you are doing work for Nutrix Publishing Company now, aren't you? A. I am.

Q. You are still working for them to this very day, isn't that so? A. Correct.

Q. And you have been working for them for a long time? A. Correct.

Q. As a matter of fact, in the current issue of a number of periodicals your pictures are

advertised for sale, isn't that correct? A. That's right.

Q. And you have been selling your pictures? A. Correct.

Q. Now, do you mean, Mr. Bilbrew, that—I withdraw that. Would you see Mr. Mishkin when he asked you to draw the pictures somewhere in New York? A. Yes.

Q. Was this meeting by chance? A. The majority of times it actually was.

Q. You had met him by chance, right? A. 1622
Correct.

Q. And he would say to you, "Draw me a picture," right? A. That's it, yes, sir.

Q. And you would come down the next day or the day after that with a picture? A. Correct.

Q. And you always drew different pictures, is that correct? A. Correct.

Q. You knew what type of book the picture was going on, didn't you? A. I had a vague idea of what the picture was going to be used for.

Q. Well, you said a moment ago, in answer to a question, that you were familiar with this type 1623
of psychology, I think. Is that what you said? A. That's correct.

Q. When you say "this type of psychology" you mean the type of book that you were going to illustrate, isn't that correct? A. That's correct.

Q. Now, you say you never read one of these books? A. I have never read one of those books.

Q. But you did read a manuscript? A. Yes.

Q. You don't remember the name of the manuscript? A. No, I do not.

Q. Do you remember what it was about? A. That I can't recall either.

Q. Do you remember the type of psychology that was portrayed in that book? A. It was to specify a girl that wore corsets, high-heeled shoes, boots, etc.

Q. Yes. And that's what you meant a while ago when you said that you were familiar with this type of psychology? A. I just turned it out.

1625 Q. Right. And you knew, Mr. Bilbrew, did you not, that when you were asked to make—to draw a picture for the cover of a book it was for that type of book? A. Correct.

Q. Isn't that correct? A. Correct.

Q. You heard the term "bondage books"? A. I have.

Q. Flagellation? A. I have.

Q. High heels, and corsets, and all that sort of thing? A. I have.

Q. And that was what you had in mind, the type—that type of book? A. Correct.

Q. Correct. And you knew your pictures were
1626 going to go onto those books—that type of book? A. That's true.

Q. Now, you talked about a book store—a book shop, isn't that right? A. That's correct.

Q. Now, there are many—and during the years 1955, '56 and '57, there were many retail book shops as there are today in the area of 42nd Street and Broadway, isn't that so? A. That's so.

Q. Now, you saw Mr. Mishkin at different book shops, isn't that so? A. That's true.

Q. Sure. It wasn't always one book shop, was it? A. No.

Q. So that you were wrong when you said you always saw him at Publishers Book Shop except on one occasion on 49th Street? That was wrong, wasn't it? A. I can only actually recall two book stores I saw Mr. Mishkin in.

Q. Well, now—

Justice Breslin: And where were they?

The Witness: Publishers Outlet on 42nd Street—

Justice Breslin: Yes?

The Witness: —and once on 49th Street, Main 1628
Stem.

Justice Breslin: All right.

Q. Now, Mr. Bilbrew, with reference to all of the exhibits which were shown to you by Mr. Stein, you said these pictures, these covers, these drawings were all made by you in 1955, 1956 and 1957, is that correct? A. That's correct.

Q. And that during the year 1956 you would give him those pictures that you drew at the Publishers Book Shop on West 42nd Street? A. Correct.

Q. Now, will you think for a moment, Mr. Bil- 1629
brew? Don't you know that Publishers Book Shop was not in existence at that time on 42nd Street, Manhattan? A. No, I don't know.

Q. You don't know that? A. No, I do not.

Q. Isn't it a fact that you saw Mr. Mishkin on occasions at the Kingsley Book Shop on West 42nd Street? A. You're correct.

Q. You knew he was employed there, didn't you? A. Correct.

Q. Now, would you say, Mr. Bilbrew, that when you said Publishers Outlet you meant Kingsley Book Shop? A. I believe that's correct.

Q. Yes, that's correct. All right. Now, these books which were shown you, you know, don't you, that these books were only written in the year 1958? A. I do not know what year the books were written in.

Q. Well, did you ever hear anyone tell you they were written in 1958 and 1959? A. No, I did not.

Q. And very few in 1957? A. Correct again.

Q. You— What is that? A. Correct again.

1631 Justice Galloway: Did anyone tell you that the books were written at another date?

The Witness: Your Honor, I cannot remember exactly when these pictures were drawn. I have done so many of them.

Justice Galloway: You told us that. It is all right.

The Witness: I have done so many it is impossible for me to actually specify the time and date the pictures were drawn.

Justice Galloway: We didn't expect you to.

Justice Breslin: We didn't expect you to.

Justice Galloway: But did anyone ever come
1632 to you and say, "When you are testifying"—in words and substance—"say the pictures were drawn in '57—rather, in '58 or late '59"?

The Witness: I didn't quite understand the question.

Justice Galloway: Well, did anyone ever say to you these books were written in '59 or '58 and you testify that the pictures were drawn then? Did anyone tell you that?

The Witness: No, your Honor, they did not.

Mr. Kern: I have nothing else of the witness.

*People's Witness, Abraham Lieberman, Direct* 1633

*Re-direct Examination by Mr. Stein:*

Q. One question, Mr. Bilbrew. You stated that the store you went to was the Kingsley Shop. Do you recall where on 42nd Street that was located, sir? A. Yes.

Q. Where? A. The downtown side of 42nd Street near the corner of 8th Avenue.

Q. Is that near a movie theater? A. Yes, it is.

Q. Is it immediately adjoining a movie theater? A. I believe so. 1634

Q. Do you know the name of that movie theater? A. I believe it's the Ansco (phonetic) or the Anco (phonetic).

Mr. Stein: That's all.

Mr. Kern: Nothing else.

Justice Breslin: All right. We will take a recess until 2:15.

Court Officer: 2:15.

(Luncheon recess.)

1635

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Mr. Stein: Abraham Lieberman.

ABRAHAM LIEBERMAN, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: Be seated. Keep your voice up. What is your name?

The Witness: Abraham Lieberman.

Court Officer: What is your address?

The Witness: 610 Monroe Boulevard, Long Beach.

1636 *People's Witness, Abraham Lieberman, Direct*

Court Officer: Business or occupation?

The Witness: Wholesale books and publishing.

*Direct Examination by Mr. Stein:*

Q. Mr. Lieberman, will you please sit back in your chair, relax; and I will ask that you speak loud enough for me to hear you at the point I am standing at. Mr. Lieberman, are you associated with the corporation Book Sales? A. I am.

1637 Q. In what capacity, sir? A. President.

Q. And how long have you been the president of that corporation? A. About seven years.

Q. What does the corporation do? A. It purchases—it buys and sells books.

Q. And to what points do you sell books? A. All over the country.

Q. Do you know the defendant in this case—Edward Mishkin? A. I do.

Q. Approximately how long have you known him, sir? A. About eight or nine years.

Q. Have you ever done any business with him,

1638 sir? A. I did.

Q. I show you People's Exhibits 79 and 80, sir. Is the defendant the person, the Edward Mishkin, whose name appears on those two debit memos? A. That's correct.

Q. Now, sir, during the past two years, or say from the middle of March, the year 1958, to January of this year, did you have cause to do any business with Mr. Mishkin? A. I don't think so.

Q. You have done no business with Mr. Mishkin at all— A. I do not think so.

Q. —during the past two years? I show you again People's Exhibits 79 and 80, sir; and I ask you if you would be good enough to read the dates on those two exhibits? A. Twelve, ten, fifty-eight, and ten, fourteen, fifty-eight.

Q. So you have done some business with him at least during the course of these— A. Yes. I just can't remember the time element involved.

Q. Have you spoken with Mr. Mishkin during the period I indicated, March 15, 1958, to, say, January of this year? That's about close to 1640 two years. A. Yes.

Q. Have you spoken with him? A. Yes.

Q. And where did you talk to him, sir? A. He was up to see me several times, and I assume elsewhere on several occasions.

Q. Where, sir? Where? A. I assume in my office at 352 Fourth Avenue.

Q. No. I am talking about being elsewhere, Mr. Lieberman. A. On 42nd Street.

Q. Where on 42nd Street, sir? A. The last— I met him in a restaurant on 42nd Street. I believe it is a Greek restaurant.

Q. Did you ever speak to him in a book store, 1641 Mr. Lieberman? A. I did, but I can't remember the time element, though.

Q. The time element is March 15 of 1958— Don't look at the defendant. Look at me.

Mr. Kern: I object to this gratuitous statement. It is not a question.

Justice Breslin: Yes, sustained.

Ask a question.

Q. Did you ever see Mr. Mishkin at a book store on 42nd Street? A. I did.

1642 *People's Witness, Abraham Lieberman, Cross*

Q. Did you ever have cause to tell— What book store, sir? What book store? A. Publishers Outlet, I believe is the name.

Q. Did you ever telephone Mr. Mishkin? A. Yes.

Q. And you dialed a certain number to get him, did you not? A. That's correct.

Q. And do you know where you called him? A. I called him at Publishers Outlet.

Q. And would you ever speak to him once you put through such a call? A. Mr. Mishkin
1643 called me back.

Q. He would call you? A. I cannot remember whether I spoke to Mr. Mishkin when I called him there. I do know that I contacted Mr. Mishkin there.

Q. There have been occasions then when you wanted to contact Mr. Mishkin, is that correct? A. That's correct.

Q. By phone? A. That's correct.

Q. And when you wanted to do so, would you call Publishers Outlet, sir? A. That is correct.

Mr. Stein: That's all.

1644

*Cross Examination by Mr. Kern:*

Q. Well, Mr. Lieberman, the District Attorney showed you People's Exhibits 79 and 80, I believe, in evidence in connection with the question as to whether or not you did, or did not, do business with the defendant in December, 1958? A. Yes.

Q. And that reminded you that you did, is that correct? A. Well, I'm assuming from our records that I did.

Q. Well, you don't know of your own knowledge whether you did business with him except from these records? A. That is not correct. It is the date that I cannot give any information on.

Q. I see. But you did do business with the defendant? A. That is correct.

Q. Did you order books from him? A. That is correct.

Q. Did you purchase books from him? A. That is correct. 1646

Q. And these are books which you purchased from him?

Justice Gassman: Referring to 79 and 80.

Mr. Kern: 79 and 80.

A. What do you mean by "79 and 80"?

Q. No. Exhibits— A. Oh, the exhibits. Yes.

Q. Are those the books? Just look at the titles. A. I recognize some of the titles.

Q. Yes? A. I recognize—

Q. Which ones do you recognize? A. I believe I remember "Eyewitness," "Masque," "Explosive," and "Bus Ride." 1647

Justice Gassman: Who did the buying for your firm?

The Witness: I did some of it. My associate did some of it, too.

Q. And when your associate—Did you buy these books from Mr. Mishkin, or did your associate? A. In the main, my associate bought those books from Mr. Mishkin.

Q. You were familiar with the books, though, weren't you? A. Yes.

Q. You sell, I believe you said in answer to a question, throughout the country? A. Yes, I do.

Q. And you also published books, did you not? A. Yes.

Q. You print books, do you not? A. No. We publish books. We do not print them.

Q. Well, when you say "publish" you mean you prepare them— A. That's correct.

Q. —and then you turn them over to a printer — A. That is correct.

1649

Q. —and a book binder— A. That's correct.

Q. —and the platemakers, the illustrators, is that correct? A. That's correct.

Q. You farm out all of the steps that go into the manufacture of a book? A. That is correct.

Q. Now, these books, though, came to you complete, is that correct? A. That is correct.

Q. The last item, you would say, was towards the latter part of the year 1958? A. I would assume from the record that would be so.

Q. Now, you bought many of these books, did you not? A. I bought many books, including these.

1650

Q. Did you buy many of these books—many copies of each of these volumes? A. I cannot remember how many I bought.

Q. Well, can you remember? A. I bought quantities of them. That covers the question.

Q. You bought them, of course, for retail, did you not? A. That is correct.

Q. And you did sell them? A. That's correct.

Q. Throughout the country? A. That is correct.

Q. Shipped them everywhere? A. That's correct.

Q. Do you still have any of those books in stock? A. I don't believe so.

Q. You are not sure, though, are you? A. To the best of my knowledge, I do not have them.

Q. Now, Mr. Lieberman, you have been in the book publishing business—book distributing business for many years, haven't you? A. That is correct.

Q. Do you read all the volumes that you have 1652
in your place of business? A. I do not.

Q. Well, do you make any effort to familiarize yourself with the contents of the books? A. I do not.

Q. You don't. You wouldn't manufacture, or sell, obscene or salacious literature, would you, or pornographic literature? A. You will have to define that question.

Q. Can you define it? A. I can't.

Q. Are you familiar with Section 1141 of the Penal Law of the State of New York? A. Vaguely.

Q. Are you familiar with laws regulating— 1653
or laws concerning the printing, or the writing, or the illustrating, or the publishing, or the manufacturing, or any step that goes into the completion of a book which is defined in the statute as obscene, salacious, disgusting, lascivious, pornographic? Are you familiar with that? A. The general wording of the law?

Q. Yes. A. Yes, more or less.

Q. You don't violate the law, do you? A. To the best of my ability, I do not.

Q. You try not to, of course? A. That is correct.

Q. These books which your partner bought and some of the titles of which you are familiar with weren't pornographic in your opinion, were they?

Mr. Stein: Objection. The witness is not an expert.

Mr. Kern: He is an expert, I submit very respectfully.

Justice Galloway: Did you read these books, Mr. Witness?

1655 The Witness: I did not.

Justice Galloway: He didn't read them.

Q. Did you discuss the books with your partner? A. I did not except—"discuss" is a great, big, open word. If you ask me the definite question, I can give you a definite answer.

Q. Did you talk with your partner about the books? A. Yes.

Q. Did you talk about the contents of the books with him? A. No.

Q. Did you talk with him about the type of book which you were buying? I will withdraw
1656 that. Did you ever, in connection with—Did you ever read Kraft-Ebling? A. Yes.

Q. Did you ever read a book called "Sex Deviation"? A. There are several by that title.

Q. "Sex Anomalies"— A. I never read that.

Q. —and not "Sex Deviation." A. Didn't read that.

Q. You've read a good deal about sex deviation, have you not? A. Break that question down. I don't quite understand that.

Q. Well, now, do you know what the word "deviation" means? A. Yes.

Q. Deviation from what we consider to be the normal, is that correct, or what I might consider to be the normal, or what you might consider to be the normal? A. Well, I am familiar with the fact that there are discussions on these terms.

Q. Well, Mr. Lieberman, you laughed when I used the word "normal." A. That's right.

Q. There's a reason why you laughed, isn't that so? A. More or less.

Q. Now, bearing in mind what you read in Kraft-Ebling and the other sex abnormality books, Deviation Anomalies—you know what I am referring to, don't you? A. Which other books? 1358

Q. Any other book on the subject similar to Kraft-Ebling? A. Let's say Kraft-Ebling.

Q. All right. And the sex deviation books, lesbianism, homosexualism, things of that sort. A. Well—

Q. Did you read any books on that subject? A. I read "The Well of Loneliness."

Justice Breslin: What?

The Witness: I read "The Well of Loneliness." 1659

Q. Well, now, Mr. Lieberman, you have read considerably, haven't you, of the literature during this century and the 19th Century? A. All literature.

Q. "The Well of Loneliness" is a book that enjoys a wide sale today, doesn't it? A. It does. It does.

Q. At one time it was very much out of order, wasn't it? It was a book that was banned, isn't that correct? A. I don't think that "Well of Loneliness" was banned in the United States.

Q. Well, it did provoke a great deal of discussion and controversy throughout the civilized world? A. That it did.

Q. Now, that's a classic today, isn't it? A. Yes.

Q. Or it is considered to be a classic? A. Yes.

Justice Galloway: Do you consider it a classic, Mr. Lieberman?

The Witness: I don't consider any particular
1661 thing a classic. It is considered generally a classic.

Justice Galloway: All right.

Q. DeMaupassant's "Scarlet Letter" is considered a classic today, isn't it? A. It is.

Q. And you say that as a result of your wide experience in—and your familiarity with contem—with modern and—with modern literature and with literature of the past century? A. I say that because it is generally accepted as a classic.

Q. Yes. Guy DeMaupassant—you have read
1662 his books? A. Yes.

Q. These books were condemned at one time, were they not? A. They were frowned upon at one time.

Q. Yes. And you consider them classics today, don't you? A. I think that they are books that should be read.

Q. Yes. Do you have—You went to college, did you? A. No.

Q. You have no degrees, have you? A. No.

Q. Now, you say you never read any one of these books, the titles of which you are familiar with now? A. I never did.

Q. You did not discuss the contents of the books with your partner? A. I did not.

Q. Did you ever discuss with your partner, Mr. Housner—is that his name? A. Housner.

Q. —the necessity for scrutinizing very carefully the books which he bought for the firm and distributed for the firm? A. If I discussed that, that I would have discussed scrutinizing them very carefully, all the books that come into the firm?

Q. Yes. Well, did you ever discuss with him 1664
the necessity for close scrutinization to be certain that you weren't violating the law? A. I am absolutely unable to do anything like that. I cannot scrutinize books that come in.

Q. No. Did you ever discuss with your partner the need to examine books to make sure you are not violating the law? A. No.

Q. You didn't think that was ever important? A. That's more or less correct.

Q. All right. But these books that you are talking about, the titles of which you recognize, were sent by you all over the country? A. That's correct. 1665

Mr. Kern: I have nothing else.

Justice Gassman: Tell me this: How big a book was "The Well of Loneliness"?

The Witness: Somewheres near 350 pages.

Justice Gassman: Was that a soft-covered book or a hard-covered book?

The Witness: It was a hard-covered book. Now it is a soft-covered book as well.

Justice Gassman: And at what price did "The Well of Loneliness" sell in hard covers?

The Witness: When it was first published here? I believe it was about two and a half dollars. I think it is about seventy-five cents now.

Justice Gassman: And is the soft-covered book also three hundred pages?

The Witness: About.

Justice Gassman: Do you know of anyone who sells "The Well of Loneliness" for five dollars?

The Witness: I don't.

1667 Justice Gassman: All right.

Justice Breslin: These exhibits, 79 and 80, would indicate that these books were returned by your concern to Mishkin, is that right?

The Witness: One of them that's in red would obviously be a return. The other I didn't really scrutinize.

Justice Breslin: Well, look at it, sir—showing him People's Exhibit 79.

The Witness: Yes. This would be returned for credit.

Justice Breslin: Just answer the question. Did

1668 you know about the return of these books to Mishkin?

The Witness: I know only by the record. We do about a million dollars worth of business a year, and we handle a tremendous quantity of books.

Justice Breslin: Well, is this a usual procedure, to return books to—

The Witness: Yes.

Justice Breslin: —a man from whom you buy them?

The Witness: Yes, it is.

Justice Breslin: Just answer this "yes" or "no." Did you have any particular reason for returning these books to Mishkin?

The Witness: I can't say now.

Justice Breslin: Just "yes" or "no"?

The Witness: I don't know.

Justice Breslin: You don't know.

Mr. Stein: That's all, Mr. Witness. Thank you.

Mr. Stein: Call Peter Vaccarella.

1670

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PETER C. VACCARELLA, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: All right. What is your name?

The Witness: Peter C. Vaccarella.

Court Officer: Your home address?

The Witness: 189-15 50th Avenue.

Court Officer: Where is that?

The Witness: Flushing, Queens, New York.

Court Officer: Your business or occupation? 1671

The Witness: Store owner at 1481 Broadway.

Court Officer: All right. Keep your voice up.

Justice Gassman: What kind of a business?

The Witness: Store owner. Magazine and book store owner.

*Direct Examination by Mr. Stein:*

Q. Mr. Vaccarella, would you please sit back in your seat; and I ask you to speak loudly so I can hear you at this point, please. Mr. Vaccarella, are you married? A. Yes, I am.

Q. Do you have any children? A. Yes, three.

Q. And what book store are you presently associated with? A. Peter Vaccarella Book Store. It is 1481 Broadway, in a subway arcade.

Q. That's on 42nd Street? A. Yes. The entrance is 205 42nd Street.

Q. You are the owner of that store? A. That's right.

Q. Do you know the defendant in this case—
1673 Edward Mishkin? A. Yes. I know him for approximately—

Q. How long have you known him? A. — six or seven years.

Q. Were you at one time in business with him, sir? A. Yes, I was.

Q. And when did that business relationship cease? When did it end? A. I believe two year ago, two and a half years ago.

Q. That would be about December of 1957, sir? A. Yes, '57.

Q. Now, when did you open the Peter Vaccarella Book Store? A. March 1, 1958.

1674 Q. Since the time you have opened that store, did you—and down to the beginning of this year —did you ever enter into any conversations or negotiations with this defendant— A. Yes.

Q. —relating to your store? A. Yes.

Q. Approximately how many times, sir? A. Well, you could say a dozen or—times.

Q. Would this extend down from the March 1st period on down to about when, sir? A. To about four or five months ago.

Q. Can you fix these conversations—the dates of these conversations exactly? A. No, I can't, sir.

Q. And would you tell us what these negotiations and conversations concerned, please? A. Well, general business and regardings to purchasing of books.

Q. By whom? A. Purchasing of books.

Q. Who was to purchase the books? A. I was.

Q. And for what purpose? A. To resell at my store.

Q. At your store. And did you enter into any agreements with the defendant for the purchase 1676
of books? A. Just to purchase them.

Q. Yes. Did you enter any such agreements? A. Yes.

Justice Galloway: Did you buy any books from him?

The Witness: Yes, sir.

Justice Galloway: All right.

Q. Now, sir, I ask you if you would be good enough to step down from the witness stand and look at the books that you see displayed on these two tables and pick up any of the books that you may have entered into the agreement 1677
with the defendant for the purchase of.

Justice Gassman: Will you call them out one by one as you go along?

A. "So Firm and So Fully Packed."

Justice Gassman: I am sorry. I can't hear you.

Justice Breslin: "So Firm and So Fully Packed."

The Witness: "So Firm and So Fully Packed."

A. (Continuing) "Tattle Tales."

Mr. Stein: One moment. Exhibit 23. "Tattle Tales," Exhibit 38. "Betrayal," Exhibit 28. "Smooth and Sassy," Exhibit 37. "Satin Satellite," Exhibit 4. "Catanis," Exhibit 24.

Justice Gassman: 44?

Justice Breslin: 24.

Mr. Stein: 26. Excuse me.

Justice Gassman: 26?

Mr. Stein: Yes, sir.

1679 Q. Mr. Vaccarella, would you be good enough to go down the line one at a time, and if you see anything you recall agreeing to buy from the defendant, let us know. A. "Sex Switch." That's about the only thing I can remember.

Q. "Sex Switch." And will you look at these exhibits, please, sir? Exhibit No. 40. Anything else, sir? A. That's about the best I can remember.

Q. All right. Thank you, sir. Will you sit down? Now, have you had occasion to speak to the defendant from the period of about March 15th, say two weeks after you opened your store,
1680 down to the beginning of this year? A. Yes, about—

Justice Gassman: March 15th of what year?

Mr. Stein: The year he opened the store—1958.

The Witness: '58.

A. —about a dozen times.

Q. How often per month would you speak to him? A. I would say once a month or once every five or six weeks.

Q. Where would you speak to him, sir? A. At the Publishers Outlet on 42nd Street.

Q. Would you see the defendant in that store? A. Yes.

Q. Did you ever see the defendant buy anything in that store, sir? A. No.

Q. Did you ever see the defendant do any work in that store, sir? A. No.

Q. Was the defendant ever told to leave that store, sir?

Mr. Kern: Oh, now, I object to that. 1682

Justice Breslin: Yes, sustained.

Q. Sir, at approximately the time you opened your store, did you have a conversation with the defendant relative to the Publishers Outlet Store? A. I don't know what you mean by that, Counsel.

Q. Well, did you talk to him about the store in any way that you remember? A. Other—just talk—talking about the store, I mean; that's all.

Q. What did he say to you about the store? A. Well, I was under the impression he owned 1683 the store.

Mr. Kern: Oh, I move to strike that out.

Justice Breslin: Strike it out.

Q. Don't tell us what impression you had. But did you talk to him about it? A. Yes.

Q. What did he say to you, sir? A. Well, he said he was part owner of the store.

Q. And was there anything else to the conversation? A. Not that I remember.

Q. Did you answer him? A. Beg pardon?

Q. Did you answer him? A. Did I answer him?

Q. Yes? A. Well, he didn't say anything.

Q. Well, he said he was part owner of the store. Was there anything else that you recall to the conversation? A. No, I don't.

Q. All right.

Justice Gassman: When you bought books from him—you said you bought one, two, three, four, seven books—did you get any bill from
1685 anybody for those books?

The Witness: It was a cash deal.

Justice Gassman: You mean you got no bill at all from anybody?

The Witness: No. Marked it down as cash business, purchase of books.

Justice Gassman: How did you pay him for it?

The Witness: In cash.

Justice Gassman: To whom?

The Witness: To Mr. Mishkin.

Justice Gassman: Who delivered those books to you?

1686 The Witness: He had several fellows. I don't remember their names.

Justice Breslin: How much did you pay for these books, sir?

The Witness: A dollar—

Justice Breslin: Apiece?

The Witness: —a dollar and a half, two dollars.

Justice Breslin: A dollar, a dollar and a half, two dollars apiece?

The Witness: Yes.

Justice Breslin: Where are the exhibits?

Justice Gassman: 79 and 80?

Justice Breslin: No. These books.

This book, for example, "Satin Satellite," People's Exhibit 4—

Justice Gassman: 4.

Justice Breslin: —how much did you pay for that particular book—copy, "Satin Satellite"?

The Witness: Two dollars.

Justice Breslin: Did you sell it for five?

The Witness: Four and five.

Justice Breslin: How many of these did you 1688
order? Do you recall? "Satin Satellite."

The Witness: Four or five at a time. Five of each at a time.

Justice Breslin: Did you give him repeat orders on these at times?

The Witness: Yes, after a month or so.

Justice Galloway: Well, there would be no bill come with those books when they were delivered to you, would there?

The Witness: There might have been a slip of paper.

Justice Galloway: An invoice?

The Witness: No. I will have to check it, sir. 1689

Justice Galloway: You don't have to check it. If you don't remember, say "I don't remember."

The Witness: I don't remember.

Justice Galloway: When did you go to pay the man?

The Witness: As I recall it, he gave a slip of paper with that, and I would pay it.

Justice Galloway: With the amount—

The Witness: And then I would go and pay him.

Justice Galloway: —is that right?

1690 The Witness: That's right.

Justice Galloway: When did you go and pay him, the first of the month, or just when you happened to—

The Witness: A week or so—

Justice Galloway: —feel like it? What?

The Witness: A week or so later.

Justice Galloway: All right.

Justice Breslin: After delivery?

The Witness: Yes.

1691 Justice Galloway: Well, how many of those books in all, would you say, you purchased over this period of time?

Q. Over that period of time? And I don't expect an exact amount.

The Witness: About two or three hundred.

Justice Galloway: All right.

Justice Breslin: By the way, when you were in business with this defendant, where were you in business?

The Witness: 218 West 47th.

Justice Breslin: 47th?

1692 The Witness: That's right.

Justice Breslin: Under what name, sir?

The Witness: Telephoto Publishing Corporation.

Justice Breslin: How long were you in business with this defendant?

The Witness: Offhand, about two years. I haven't got the slip with me.

Justice Gassman: Tell me, did you keep any books or records?

The Witness: On Telephoto?

Justice Gassman: No, no. In your store?

The Witness: Oh, yes.

Justice Gassman: What?

The Witness: Yes.

Justice Gassman: How did you enter the purchase of these books?

The Witness: Cash sale. Cash. We—see, we have a back number magazine store, and we purchase magazines from the public, and books; and we pay cash for them. We mark it as "cash sale." The ordinary companies, like the distributors, we have bills from them.

Justice Gassman: Well, how many people have 1694
you done business with from whom you made cash purchases and paid them in cash and just got a slip of paper?

The Witness: Many. I mean, as far as—not as to paper—The public coming in and selling us magazines, such as comics and pocket books, which are the paperback books which we sell for fifteen cents—

Justice Gassman: Those are not book sellers, are they?

The Witness: We call them pocket books.

Justice Gassman: No, no. No. I am talking about the people that sell you the books. 1695

The Witness: No, no. See, we don't sell new books. We have back number magazines.

Justice Gassman: But when you bought new books—

The Witness: Yes?

Justice Gassman: —unused—

The Witness: Yes.

Justice Gassman: —did you buy them from anybody else from whom you didn't get any bill but merely got a slip of paper and paid in cash?

The Witness: I don't remember, sir, at that particular time.

Justice Galloway: Are you through with this witness?

Mr. Stein: Yes. I am through.

*Cross Examination by Mr. Kern:*

Q. Mr. Vaccarella, it is a fact, isn't it, that what you have in your mind is that this de-
1697 fendant was the only one from whom you bought new books and paid cash, is that right? A. I— Will you rephrase that, sir?

Q. Well, he is the only one, you say, from whom you bought new books for cash? A. That's right.

Q. Now, that's not a pure coincidence, it just happened that way? A. It just happened that way.

Q. There is nobody else, is that correct, to whom you paid cash for new merchandise? A. I don't remember.

Q. Well, now, were you subpoenaed to come
1698 here today? A. Yes, I was.

Q. You have a subpoena, have you? A. I have.

Q. And let me see it, please. Now, this subpoena directs your appearance at this court on October 25th? A. Yes, sir.

Q. That was Tuesday? A. Right.

Q. Day before yesterday? A. Yes.

Q. And you came here on the 25th? A. I did.

Q. And you went, not here, but to the District Attorney's office, isn't that right? A. That's right.

Q. Now, was that your first visit with Mr. Stein? A. No.

Q. You had seen him many times before, isn't that correct? A. That's right.

Q. And you had seen many police officers before? A. Yes.

Q. As a matter of fact, the police did come into your shop sometime ago, didn't they? A. They did.

Q. And they found certain books and pictures and papers, isn't that so? A. That's right. 1700

Q. And they were going to place you under arrest, weren't they? A. No, sir.

Q. Well, did they tell you that you could be prosecuted for possessing these books and papers? A. At that time? No one has ever told me anything.

Q. At some other time after that? A. Not me. I—I wasn't in the store at the time.

Q. Well, then, why did you ask "at that time"? What do you mean by asking that? A. You said at that—You said at that time when the police officers—

Q. All right. A. —came in. I wasn't there 1701 when the police officers came.

Justice Galloway: You weren't in the store when the police officers came in. You have a partner or someone who was there?

The Witness: No. People working there.

Justice Galloway: All right.

Q. Did you hear from anybody that you could be prosecuted for the possession of certain books and documents in your place of business? A. As far as I know—I mean—I don't know.

Q. Well, did any police officer in the district attorney's office tell you that you might be prosecuted? A. No.

Q. They asked you to cooperate, isn't that so? A. They asked me to tell the truth.

Q. Nobody ever used the word "cooperate" to you, is that right? A. I don't remember, sir.

Q. But you do remember that they said, "Tell the truth"? A. That's right.

Q. You do remember that? A. Yes.

1703 Q. Now, how many times did Mr. Stein or some police officer talk to you about who owned Publishers Outlet? A. The first time I met them and the second time I met them.

Q. And only on two occasions, is that correct? A. It might have been more, but I don't remember.

Q. Talking about the owner of Publishers Outlet— A. That's right.

Q. —right? And when Mr. Stein asked you a little while ago about the owner of Publishers Outlet you said, "I was of the impression that he was the owner of the store." Do you re-

1704 member that answer? A. I said that, yes.

Q. And then I objected, and then there was another question asked of you; and you said— A. I didn't answer that question, because you objected before I answered.

Q. Didn't you say, "I was of the impression that he was the owner of the store"? A. Oh, yes, I said that. Yes.

Q. All right. Then another question was put by Mr. Stein; and you said, "He said he was a part owner." A. Yes.

Q. You knew that, didn't you, when you said, "I was of the impression that he was the owner

of the store?" You remembered that he had told you that he was a part owner? A. Yes.

Q. Notwithstanding that, you said, "I was of the impression that he was the owner," is that correct? A. I said that.

Q. Yes. You are now of the impression that he was the owner, isn't that correct? A. No. I don't even know who owns it.

Q. You know definitely that he was the owner, because he told you that? A. No, I'm not.

Justice Galloway: He says he doesn't 1706
even know who owns it.

Q. You know— A. I know that there's a partnership there.

Q. Did you say that he told you he was a part owner? A. Will you—Can I ask him to repeat that. I don't remember it.

Justice Galloway: You testified previously—I'll tell you you did—that Mishkin told you he was a half or part owner of the store.

Justice Gassman: Part owner.

The Witness: Yes. 1707

Justice Galloway: Did he tell you that?

The Witness: Yes.

Justice Breslin: You said before, too, that you are of the impression—as Mr. Kern just indicated to you, you answered that question, "I was of the impression that he was an owner of the store—the owner of the store," and that was stricken out. Were you of the impression, sir, that he was the sole owner of the store?

The Witness: No.

Justice Breslin: You weren't?

The Witness: No.

Q. Were you of the impression that he was a part owner of the store? A. Yes, I was.

Q. Based upon what he told you— A. Yes.

Q. —and upon nothing else, is that correct? A. That's all. That's right.

Q. Now, did he tell you in so many words, "I am a part owner of the store"? Is that what he said to you, in that language? A. Not that language. I mean, I can't pinpoint exactly what language it was.

1709 Q. Well, he used some language, right— A. Yes.

Q. —that gave you the impression that he was a part owner of the store? A. That's right.

Q. Then he never said to you, in fact, in so many words, "I am a part owner of the store," isn't that right? A. No matter how you put it, he gave me the impression—

Q. Now, now. Let's be honest about this. The truth is, Mr. Vaccarella, all you mean to tell this Court is that he gave you the impression that he was a part owner, is that correct? A. Yes.

1710 Q. You received that impression— A. I received that impression.

Q. —from things which he said and things which he did? A. Right.

Q. But he never told you in so many words, "I am the owner or part owner of the store," is that correct? A. Well, he said—it made me—gave me the impression that he said that—

Q. But he never said in just those words, "I am the owner or a part owner of the store," isn't that right? A. Well, I don't know how to answer that, sir.

Q. Well, now, Mr. Vaccarella—

Justice Breslin: What did he say to you that gave you that impression, sir, that he was a part owner of the store? Just what did he say to you?

The Witness: Well, during a conversation we would say—he would say he was part owner of the store. That's all. I mean, I don't remember exactly when or—

Q. Well—

The Witness: —I just don't know exactly how he put it or—All right, he gave me the impression that he was the—part owner of the store. 1712

Q. Then, Mr. Vaccarella, in perfect fairness to the defendant and prosecution in the case, isn't it a fact that the impression which you received and which prompted you to believe that he was an owner or a part owner of the store was only gained from general conversation? Isn't that right? A. You can put it that way.

Q. Yes. And he never said to you in just that language, "I am a part owner of the store," isn't that right? A. I don't know how to put it that—I mean— 1713

Q. Well, Mr. Vaccarella, is there some reason why you don't want to answer that question directly? A. I don't know how to answer it.

Q. Did some policeman tell you that you must say that he is a part owner of the store? A. No, they did not.

Q. Now, again, and I am not going to dwell on this, you did say that this is just an impression which you received, isn't that correct? A. Yes.

Q. And an impression, you will agree with me, is something which is impressed upon your

mind as a result of something that happens or something that you hear? A. That's right.

Q. You heard something which led you to believe and thus forced an impression upon your mind that he was the owner or part owner, isn't that true? A. That's right.

Q. And he never said in so many words, "I am the owner of the store," did he? A. No.

Q. And he never said in so many words, "I am a part owner of the store," did he? A. That, I can't say. I mean I—

1715

Q. Well, you don't remember his ever saying that, do you? A. No, no.

Q. He may have said it and he may not have said it? A. That's right.

Q. Is that correct? A. That's right.

Q. That's your best answer? A. Yes.

Mr. Kern: That's all.

Justice Galloway: I will ask him a question, then.

What were the things that impressed on your mind the fact that he was a half owner?

1716

The Witness: Well, when I—

Justice Galloway: —part owner?

The Witness: When I went there, I saw him there—

Justice Galloway: Yes?

The Witness: —and I was under the impression that he was—

Justice Galloway: No, no, no. You got an impression. What was the impression? Did he tell you something that gave you the impression, or what?

The Witness: Not in so many words, but I think a person is there, I think he owns the place.

Justice Galloway: Well, he might be a salesman there, couldn't he be?

The Witness: No, I don't think so. I don't think so. Not in my opinion anyhow.

Justice Galloway: Well, was there anyone else in the store?

The Witness: Yes.

Justice Galloway: Well, couldn't they have been the owners? 1718

The Witness: Oh, yes.

Justice Galloway: Then why would you get the impression that he was part owner?

The Witness: Just from hearsay—I mean, people talking.

Justice Galloway: Hearsay from whom?

The Witness: People talking.

Justice Galloway: What people?

The Witness: Fellows in the business. Many walk around, you know. You hear. You talk to different people.

Justice Galloway: But nothing from what this man said or what this man did? 1719

The Witness: I don't know how to put it, sir.

Justice Breslin: Well, when you testified here before, sir, on direct examination that at one time the defendant told you that he was a part owner of the place, what did you mean by that?

The Witness: I'm trying to pin point it exactly when he told me that. Right now, I don't remember.

Justice Breslin: You say you are trying to pin point when he told you?

The Witness: Yes.

Justice Breslin: Did he tell you that?

The Witness: I was under the impression he did. I mean, I am trying to remember, you see? I mean, I don't—

Q. But, now, what you told me is correct—you don't know whether he said it or didn't say it, isn't that right? A. Well, that must be so.

Mr. Kern: Yes. That's all.

Justice Galloway: When you went to pay the
1721 people, you didn't go up to pay anybody else but Mishkin, to pay him, did you?

The Witness: No.

Justice Galloway: Why did you go to him?

The Witness: Because I done business with him with the books.

Justice Galloway: You spoke to him about buying the books?

The Witness: Yes.

Justice Galloway: All right.

Justice Gassman: Tell me this, when the police were in your place and they found those books down there, did they confiscate any books
1722 in your shop?

The Witness: Well, I—I wasn't—I was out of town, I believe, at the time; and I don't know exactly what happened there. I don't think—

Justice Gassman: Tell me this, have you in your store today any of these seven books that you picked out?

The Witness: No.

Justice Gassman: You have not?

The Witness: No.

*People's Witness, Peter C. Vaccarella, Re-direct* 1723

*Re-direct Examination by Mr. Stein:*

Q. Mr. Vaccarella, just two questions. Did you ever talk to the defendant—Mr. Mishkin—about the ownership of the Publishers Outlet Store?

Mr. Kern: Now, I object to that as repetitious.

Justice Breslin: Overruled.

Mr. Kern: Exception.

1724

Q. Now, just relax, Mr. Vaccarella. Sit back and relax.

Mr. Kern: He is relaxed.

Q. Did you ever talk to Mr. Mishkin about the ownership of Publishers Outlet? A. On some occasion or so—I mean, I can't pinpoint exactly when it was.

Q. The answer is, "Yes"? A. Yes.

Q. And did Mr. Mishkin ever tell you, "I am a part owner of the Publishers Outlet Store"? That's all I want to know.

1725

Mr. Kern: I object to that. The witness has said on direct examination and cross examination that he has no recollection, he may have said it, he may not have said it, half a dozen times.

Justice Breslin: Answer the question. Overruled.

Q. Did Mr. Mishkin ever say to you, "I am a part owner of the Publishers Outlet Store," or words to that effect? A. He gave me that impression, Mr. Stein. I just don't remember exactly when—

Q. No, no. Did he? Forget the impression now for a moment, Mr. Vaccarella. All that we want to know is whether the defendant ever used those same words or words meaning the same thing?

Mr. Kern: I object to that.

Justice Breslin: Yes, sustained. The question is vague.

Q. Mr. Vaccarella, did the defendant ever say to you, "I am a part owner of the Publishers
1727 Outlet Store," or words to that effect?

Mr. Kern: I object to that.

Justice Breslin: Overruled.

Q. Did he, sir? A. I was under the impression of that, Mr. Stein.

Justice Galloway: That wasn't what you were asked. You were asked a simple question. We want a simple answer.

Q. Did he ever say that to you, or words to that effect? A. I don't remember, Mr. Stein.

1728 Justice Breslin: Look, Vaccarella, you say you did at one time or another have a discussion with this defendant concerning the ownership of that store, is that correct?

The Witness: I don't get it, sir.

Justice Breslin: You testified that at one time you did talk to this defendant concerning the ownership of that store, is that correct?

The Witness: Yes.

Justice Breslin: How many times did you talk to him about the ownership of that store? Once or more than once?

The Witness: Possibly once.

Justice Breslin: And where was it that you had that conversation with him concerning the ownership of that store, the—what is the name?

Mr. Stein: Publishers Outlet.

Justice Breslin: —Publishers Outlet?

The Witness: That's—

Mr. Kern: May I—

Justice Breslin: You have an objection.

Mr. Kern: —with due regard to the Court—No, not an objection. I don't like to interrupt the Court, but the witness said 1730
in answer to Your Honor's question, "Did you talk to him once," he said, "Possibly once."

Justice Breslin: Yes?

Mr. Kern: Now, I respectfully submit that, based upon that answer—

Justice Breslin: Yes?

Mr. Kern: —any question as to when it was is objectionable, because of the possible—he doesn't know if he ever talked to him.

Justice Breslin: I started a question. I will withdraw that. 1731

Do you have any definite recollection, sir, of ever talking to this defendant concerning the ownership of that store—Publishers Outlet? Do you recall?

The Witness: No definite recollection.

Justice Breslin: Do you recall any definite conversation you had with this defendant?

The Witness: No definite—

Justice Breslin: No?

The Witness: No definite recollection, sir.

Justice Breslin: All right. You have not. All right.

Mr. Stein: All right. That's all, Mr. Vaccarella.

Justice Breslin: Step down.

Justice Gassman: Who is your next witness, Mr. Stein?

Mr. Stein: Dorothy Yeeto.

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DOROTHY YEETO, having been called as a
1733 witness, was first duly sworn, and testified as follows:

Court Officer: All right. Be seated. Keep your voice up. What is your name?

The Witness: It is Dorothy Yeeto, Y-e-e-t-o.

Court Officer: And your home address?

The Witness: 640 East 14th.

Court Officer: What do you do for a living?

The Witness: Well, I have a typing and art service.

Justice Gassman: I can't hear you.

The Witness: I have a typing and art service.

1734 Court Officer: All right. Keep your voice up, please.

*Direct Examination by Mr. Stein:*

Q. Mrs. Yeeto, I want you to sit back in your chair a little, please. Just try to raise your voice so that I can hear you where I am standing out here, right? A. Yes.

Q. Mrs. Yeeto, where is your typing service located? A. It is located at—I'm so frustrated I am not able to think clearly.

Q. Don't be nervous. Why don't you put your bag on that little place in front of you and just sit back. All right. A. It is at 704 Sixth Avenue.

Q. And what is the name of your typing service, madam? A. I said Cold Type.

Q. Cold Type? A. Yes.

Q. Is that Cold Type Composition Service, madam? A. Yes, it is.

Q. Now, do you type manuscripts? A. Yes, we do.

1736

Q. And have you ever typed any manuscripts for a Mr. Norman Levenberg? A. Yes, I did.

Q. And would that have been under what name, madam? A. It would be under the company.

Q. What company name would that be? A. That would be under Cold Type.

Q. When you typed something for Mr. Levenberg, what name would you bill? Did you bill anyone? A. Yes, we did.

Q. What name would you bill? A. To—well, I believe it was Norman Press.

Q. Norman Press.

1737

Justice Breslin: I didn't get that. Norman Press?

The Witness: No. He was also under another name.

Q. What name was that? A. Which was Automatic.

Q. Automatic? A. Yes.

Q. Automatic Offset? A. Printing.

Q. Now, madam, when you do a typing job, you prepare certain bills, don't you, for the typing? A. Yes, I do.

Q. And how many copies of those bills do you prepare? A. Three.

Q. What do you do with those three copies? A. Well, with one of them I send it out.

Q. Yes? A. The other I put in the files. And the third I keep in the files, also, until the bill is paid.

Q. Now, these three copies, including the ones you keep in your files, you prepare these bills in the regular course of your business, don't you? A. Yes, I do.

1739

Q. And these bills are prepared in the regular course—it is the regular course of your business to prepare them, is that right? A. Yes, it is.

Q. Now, I show you nine documents, madam. Can you identify these? Just generally, what are these? A. Well, these are the bills that I had sent.

Q. That you had sent to whom, madam? A. To—that's Automatic Printing.

Justice Gassman: Sent to whom?

The Witness: To Automatic Printing.

Justice Gassman: Automatic Printing?

1740 The Witness: Yes, sir.

Q. And one of them is made out to an Automatic Offset, is that right? A. Yes, it is. I don't give much heed to the—it is usual—it implies the same thing.

Q. And one day in March of this year, or late February, did you turn these over to me, madam? A. Yes, I did.

Q. And were other copies of these, at the time you sent them out, sent out to Mr. Levenberg? A. Well, they were sent out weekly.

Q. Well, when you prepared this copy—

Justice Gassman: Mr. Stein, you stand so close to her that the conversation becomes confidential, and we can't hear it.

Q. When you prepared this copy, Mrs. Yeeto, you also prepared a copy which you gave to Mr. Levenberg, is that correct? A. Yes, I did.

Mr. Stein: Now, I offer these nine documents in evidence as People's Exhibits eighty-two, three, four, five, six, seven, eight, ninety, and ninety-one, collectively and inclusive. 1742

Mr. Kern: I respectfully object on the grounds they are irrelevant, incompetent, immaterial, not binding on this defendant, not reflecting upon the issues in this case.

Mr. Stein: If Your Honors please, Mr. Levenberg—

Justice Breslin: What did you want to say?

Mr. Stein: Mr. Levenberg, Your Honors may recall, was asked on direct examination to which typist he turned over his manuscripts, and one of the typists' name 1743 was Dorothy Yeeto of the Cold Type Composition Service.

Mr. Kern: This is a transaction with the witness of the prosecution. How does that bind us?

Mr. Stein: The witness also testified as to where he obtained the manuscripts, Your Honor.

Justice Breslin: Well, do these exhibits which you now offer identify the particular manuscripts?

Mr. Stein: Oh, indeed they do, Your Honor.

Justice Gassman: They are merely identified by name?

Mr. Stein: By name of book and date.

Mr. Kern: I press my objection, nevertheless, if the Court please.

Justice Breslin: Objection sustained.

Mr. Stein: Your Honors, may I be heard on this?

1745 Justice Breslin: Yes.

Mr. Stein: Mr. Levenberg testified that he received from the defendant, certain manuscripts, that he took these manuscripts and gave them to a typist to retype on smaller print. He stated that when he got these back from the typist he printed books which he has identified, books bearing certain names. He further stated a time period at which he obtained these manuscripts from the defendant. These manuscripts bore titles. The books which were ultimately printed bore titles. He

1746 gave these titled books or manuscripts to the witness currently on the stand. She states that at certain times she received manuscripts from a Mr. Levenberg, that when she did so she typed up manuscripts. This is her business. And that whenever she types manuscripts she makes a bill. Now, there's only one Norman Levenberg. There's only one Automatic Printing who gives manuscripts with certain titled books on it to a Dorothy Yeeto at a given time period.

Justice Gassman: But, Mr. Stein, where is there any proof that a particular manuscript entitled so-and-so is the same manuscript that we have here before us? You may have a bill for typing a certain manuscript named "Tale of Two Cities."

Mr. Stein: That's right, Your Honor.

Justice Gassman: Where is there anything to indicate that the manuscript she typed under that name is the same manuscript that we have here in evidence? 1748

Mr. Stein: Now, Your Honor—

Justice Breslin: Wait, please.

How many manuscripts did you type for this Mr. Levenberg?

Mr. Stein: Levenberg.

Justice Breslin: How many did you type for him?

The Witness: Gee, I really wouldn't know exactly.

Justice Breslin: Have you any records with you that will refresh your recollection?

The Witness: Well, I would say at least a dozen. 1749

Justice Breslin: At least a dozen? Do you recall the names of any of them?

The Witness: Well, they are really on the bills.

Justice Breslin: All right. Well, you don't recall any of them offhand, do you?

The Witness: Well, I have an exceptionally poor memory.

Justice Breslin: I see. Well, now, do you have any records which would refresh your recollection as to the titles of the manuscripts you typed for Mr. Levenberg?

Well, show her the records.

Look at these. See if they will refresh your recollection.

The Witness: These are the names.

Justice Breslin: What?

Q. Does this refresh your recollection? A. Yes. One of them is "Masque."

Justice Breslin: You typed for Mr. Levenberg the manuscript which bore the title "Masque," is that correct?

The Witness: Yes.

1751 Justice Breslin: What did you do with it after you typed it?

The Witness: Well, we delivered it to him.

Justice Breslin: All right. What is the exhibit number in question?

By the way, did you do the typing yourself?

The Witness: Well, I did part of it.

Mr. Stein: May I also point out one other thing, Your Honor?

Justice Breslin: Go ahead.

Q. Mrs. Yeeto, when you drew up these docu-
1752 ments, did you place on these documents the number of pages which you typed? A. Yes, I did.

Q. It was the number of pages that would ultimately be found in the copy you typed, is that right? A. Yes, it would.

Mr. Stein: Did you have any further questions, Your Honor?

Justice Gassman: What size paper did you type the manuscript on?

The Witness: Well, that's—it is about—well, that's the size there.

Mr. Stein: Indicating People's Exhibit Number 25.

The Witness: It was—Yes, that's about the size of it.

Justice Breslin: What is the number of that?

Mr. Stein: Twenty-five.

Justice Breslin: Handing you People's Exhibit 25, will you look at that, please?

The Witness: Yes.

1754

Justice Breslin: At the inside of it. Are you able to tell us after looking at that whether you typed the original manuscript—

The Witness: Yes.

Justice Breslin: —of that?

The Witness: It does look as though we did type it.

Q. Can you tell your typing when you see it, madam? A. Well, it's—we do something similar. I couldn't say that I did this particular one, but according to this—according to the title, we did.

1755

Justice Gassman: How many typewriters were used by you when you did—

The Witness: Just one.

Justice Gassman: What make machine was that?

The Witness: It was a Modern.

Justice Gassman: A what?

The Witness: A Modern.

Justice Breslin: All right. Now, it is—

Mr. Stein: I offer these nine pieces of paper in evidence—

Justice Breslin: Well, take the first one.

Mr. Stein: —as indicated before.
Mr. Kern: I will renew my objection.
Justice Breslin: Wait a minute.
Mr. Stein: I offer the first of these.

Justice Breslin: Did you submit a bill to Levenberg for the typing of the original manuscript "Masque"?

The Witness: Yes, I did.

Justice Breslin: All right. Have you got it there?

1757 Q. Is this the document? A. Yes, that's it.

Justice Breslin: All right. That's it. Now, do you want to offer that?
Mr. Stein: I offer that in evidence.
Justice Breslin: You object to it?
Mr. Kern: I object.
Justice Breslin: Overruled. We will take it.
Mr. Kern: Exception.
Justice Breslin: People's Exhibit—
Mr. Stein: 82.
Justice Breslin: —82. (So marked.)

1758 Q. Mrs. Yeeto, People's Exhibit—

Justice Gassman: Hold it a minute, please. Would you look at this Exhibit 82 and tell me how many pages were there? You have 16 and something before it.

The Witness: Well, it could be either 116 or 16.

Justice Gassman: Well, now, which is it, 16 or 116? There's a difference of a hundred pages there.

Justice Breslin: Can't you tell from the price?

The Witness: I see it is 60. It would be—that would be, let's see—it would be 116 pages.

Justice Gassman: May I look at Exhibit 25, please. (Same handed to His Honor.)

Mr. Kern: May I see that? I should look at it.

Justice Gassman: Exhibit 25 has 116 pages in there.

Q. Now, Mrs. Yeeto—

Justice Gassman: Hand me that exhibit, please, if you are through with it. No. The bill. 1760

Q. People's Exhibit 82, Mrs. Yeeto, as well as the other bills I have shown you, all bear the name of the manuscripts you typed, is that correct? A. Yes.

Q. And the number of pages of the manuscripts? A. Yes.

Justice Gassman: Well, that speaks for itself. It is in evidence.

Mr. Stein: I just thought for purposes of the record I would make a general statement.

Justice Galloway: Just one of them. 1761

Justice Gassman: One of them, yes.

Q. All of these bills, do they not bear the name of the manuscript typed? Is that right? A. Yes.

Q. And the price? A. Yes.

Q. And the customer for whom you typed it, is that correct? A. Yes.

Q. All right. Thank you. Mrs. Yeeto, I show you another piece of paper; and I ask you if this, too, is a bill for a manuscript you did for Mr. Levenberg? A. Yes, it is.

Mr. Stein: I offer this in evidence as People's Exhibit—

Mr. Kern: 81.

Justice Galloway: That will be 83.

Justice Breslin: —83.

Mr. Kern: I object to it. Objected to.

Justice Breslin: Same ruling.

Mr. Kern: Exception.

(People's Exhibit 83 received in evidence and so marked.)

1763 Justice Gassman: What book does that cover, Mr. Stein?

Mr. Stein: The title here is "Satellite." May we have Exhibit 4, a book entitled "Satin Satellite"?

Justice Gassman: Let the record indicate the book "Satin Satellite" has 80 pages and the bill, Exhibit 83, covers 80 pages.

Q. I show you another bill, Mrs. Yeeto, and ask if this, too, is a bill for a manuscript you typed for Mr. Levenberg? A. Yes, it is.

Mr. Stein: I offer this bill in evidence

1764 as People's 84.

Mr. Kern: May I have one blanket objection to all of these which are being offered and an exception?

Justice Breslin: Yes. Right. Same ruling.

Mr. Kern: Thank you.

Justice Breslin: Received in evidence as People's Exhibit eighty—

Mr. Stein: —four.

Justice Breslin: —four.

(People's Exhibit 84 received in evidence and so marked.)

Justice Galloway: What is the book? What is the number?

Mr. Stein: The book is "Screaming Flesh".

Justice Breslin: The exhibit number of "Screaming Flesh"?

Mr. Stein: Number 21, Your Honor.

Justice Breslin: Twenty-one.

Justice Gassman: 176 pages on the bill; 176 pages in Exhibit 21.

Q. I show you another piece of paper and 1766
ask you if this is also a bill for a book which you did for Mr. Levenberg? A. Yes, it is.

Mr. Stein: I offer this in evidence as People's Exhibit 85.

Justice Breslin: Same ruling. Received in evidence as People's Exhibit 85.

(So marked.)

Mr. Stein: The name listed on this is "Swish", and People's Exhibit 29 is a book entitled "Swish Bottom".

Justice Gassman: Exhibit 85 is 176 pages—that's the bill; and Exhibit 29, 1767
the book, has the same number of pages.

Q. I show you another piece of paper and ask you if this is also a bill for a manuscript you typed for Mr. Levenberg? A. Yes, it is.

Mr. Stein: I offer this in evidence.

Justice Breslin: All right. Same ruling. Received in evidence as People's Exhibit 86. (So marked.)

Mr. Stein: People's Exhibit 86 contains the name "Queen Bee" and "So Firm and So Fully Packed", two separate names.

People's Exhibit 72 is a book entitled "Queen Bee" and People's Exhibit 23 is a book entitled "So Firm and So Fully Packed".

Justice Gassman: Will you hold it a minute, please? The bill for "Queen Bee", Exhibit 86, is for 176 pages; and the book which is in evidence as Exhibit 72 has 72 pages.

Justice Breslin: On a couple of these bills,
1769 84 and 85, you have 176 pages; and then, after that, the figure—at least, on 85—the figure 665, and on 84 the figure 664. What does that figure refer to?

The Witness: It could be the number of the ticket.

Justice Breslin: The number what?

The Witness: The job ticket.

Justice Breslin: The what?

The Witness: Job ticket.

Justice Galloway: Job ticket.

Justice Breslin: Oh, order number? Job
1770 tickets?

The Witness: Yes, that's what it is.

Q. I show you another piece of paper, Mrs. Yeeto; and I ask you if this, too, is a bill for a job you did for Mr. Levenberg? A. Yes, it is.

Mr. Stein: I offer this in evidence as People's Exhibit 87. The title "Stud Broad" appears on it. People's Exhibit 71 is a book entitled "Stud Broad". I offer this in evidence.

Justice Breslin: All right. Same ruling. That is—

Mr. Stein: 87.

Justice Breslin: —87.

(People's Exhibit 87 received in evidence and so marked.)

Justice Gassman: Exhibit 87 covers 176 pages, "Stud Broad". The book "Stud Broad" is 175 pages, Exhibit 71.

Mr. Stein: What is the differential in the pages, Your Honor?

Justice Gassman: One page.

Mr. Stein: One page. 1772

Q. Can you account for that difference, Mrs. Yeeto, the fact that the finished manuscript has one page less than the amount indicated on the bill? A. No. I really wouldn't know.

Q. I show you another piece of paper and ask you if this is a bill for a job you did for Mr. Levenberg? A. Yes, it is.

Mr. Stein: I offer this bill, which bears the name "Impact" on it, in evidence as People's Exhibit 88. "Impact" being People's Exhibit 2.

Justice Breslin: Same ruling. 88 in 1773 evidence, received.

(People's Exhibit 88 received in evidence and so marked.)

Justice Gassman: Exhibit 88, 142 pages; that's the bill. The book "Impact", which is Exhibit 2, has 140 pages.

Q. Can you account for the difference of two pages, Mrs. Yeeto, between the bill and the book? A. I'm afraid I can't, no.

Q. I show you another piece of paper and ask you if this, too, is a bill for a book which you did for Mr. Levenberg? A. Yes, it is.

Mr. Stein: I offer this in evidence as People's Exhibit 89.

Justice Breslin: Same ruling. Received in evidence as People's Exhibit 89. (So marked.)

Mr. Stein: A book entitled "Her Highness" is People's Exhibit 5.

Justice Gassman: Exhibit 89, "Her Highness", calls for 128 pages. A book, Exhibit 5, which is "Her Highness", has 128 pages.

1775

Q. I show you another piece of paper, Mrs. Yeeto; and I ask you if this, too, is a bill for a job you did for Mr. Norman Levenberg? A. Yes, it is.

Mr. Stein: I offer this bill, bearing the name "This Way" in evidence as People's Exhibit 90. A book "This Way Down" is currently People's Exhibit 34.

Justice Breslin: All right. Same ruling. Received in evidence as People's Exhibit 90. (So marked.)

1776

Mr. Kern: I take it, if the Court please, that I have an exception to each of these rulings?

Justice Breslin: Yes, you have an exception to each of these rulings.

Mr. Kern: Thank you.

Mr. Stein: You may inquire.

*Cross Examination by Mr. Kern:*

Q. You don't know—

Justice Gassman: Would you just hold it a minute, please?

1777

Mr. Kern: Yes. Sure.

Justice Gassman: Exhibit 90, "This Way", the bill calls for 192 pages; and the book, which is in evidence as Exhibit 34, has 192 pages.

Q. You don't know the defendant in the case at all? A. No, I don't.

Q. Never saw him? A. No.

Q. Never talked to him, right? A. No.

Mr. Kern: That's all.

1778

Justice Breslin: Step down.

We will give the reporter a five-minute recess.

(Recess.)

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Mr. Stein: Alfred Schaffer.

ALFRED H. SCHAFFER, having been called as a witness, was first duly sworn, and testified as follows:

1779

Court Officer: All right. Be seated. Please keep your voice up. What is your name?

The Witness: Alfred H. Schaffer.

Court Officer: Your home address?

The Witness: 216 Travers Avenue. Mamaroneck, New York.

Court Officer: Business or occupation?

The Witness: Attorney.

Court Officer: Keep your voice up.

1780 *People's Witness, Alfred H. Schaffer, Direct*

*Direct Examination by Mr. Stein:*

Q. Mr. Schaffer, you are associated with the Metropolitan Title Guarantee, are you not, sir? A. Yes, I am.

Q. And in what capacity? A. I am—Presently, I am the treasurer of the company.

Justice Gassman: What is that name, Metropolitan—?

Mr. Stein: Metropolitan Title Guarantee Company.

1781

Q. What does your company do, sir? A. We insure title to real estate and place mortgages on real estate.

Q. You originate mortgages, sell them, and service them, is that correct? A. Yes, we do.

Q. And is one of the firm for whom you originate, sell, and service mortgages the Staten Island Savings Bank? A. Yes, it is.

Q. Was that also true in 1951, sir? A. Yes, it was.

Q. Now, you also originate, sell, and service mortgage extensions, is that correct, sir? A. Yes, we extend mortgages. Yes, sir.

1782

Q. Now, sir, I ask you if you know the defendant in the case—Edward Mishkin? A. Yes.

Q. And did you at one time service the extension of a mortgage on his home in Yonkers?

Mr. Kern: Wait a minute. I object to this. I can't possibly see any relevancy.

Mr. Stein: I will state the reason for this, Your Honor.

Justice Breslin: Yes.

Mr. Stein: I have a copy here of a mortgage extension bearing the defendant's signature, which I—

Mr. Kern: Excuse me. Is this in the record? Is this for the record?

Justice Breslin: Yes.

Justice Galloway: Yes.

Mr. Kern: All right.

Mr. Stein: —which I intend to put in evidence to be used for comparison purposes with certain other items. 1784

Justice Breslin: For that purpose only, solely for signature.

Mr. Stein: Solely for signature.

Justice Galloway: Maybe he will stipulate that he signed that paper. Show it to him. Let him show it to Mr. Mishkin.

Mr. Kern: Yes, show it to us.

Yes, that's his signature. The defendant will stipulate that the name "Edward Mishkin" appearing on a certain extension of a mortgage, a carbon copy thereof— 1785

Justice Breslin: Dated?

Mr. Kern: —dated the 26th day of June, 1951, was placed there by him, the acknowledgement of which signature was taken by the witness who is now on the stand.

Mr. Stein: All right.

Justice Galloway: I would suggest that you mark that, please, for identification; or you may offer it in evidence for that purpose only.

Mr. Stein: May I offer it in evidence for that purpose?

Mr. Kern: I have no objection to it for that purpose.

Justice Breslin: Received for that purpose. Received in evidence as People's Exhibit 91. (So marked.)

Mr. Stein: Thank you very much, Mr. Schaffer.

The Witness: You are welcome.

Justice Breslin: Received in evidence for that purpose.

1787

Justice Gassman: May I have that, please?

Mr. Stein: Yes.

Oscar Shaller.

Mr. Kern: Well, now, again to save time of the Court, I don't think this is necessary. There are certain books that the district attorney is about to offer which were bound, he says, by this witness at the request of Mr. Levenberg.

Now, I will stipulate that that will be his testimony, but I want to object to

1788

it on the ground that it is not binding upon this defendant at all, has no bearing upon this case.

Mr. Stein: I would, of course, be in favor of that type of stipulation. In other words, as I understand it, Mr. Kern, Mr. Kern will stipulate that if the witness were to testify he would testify that certain books are his and that these books reflect that he bound for a Mr. Norman Levenberg or Automatic Offset, books of certain titles and given dates.

Justice Breslin: Well, what are the titles?

Mr. Stein: Well, the titles are reflected here. I don't recall them offhand, but I will read them off.

Justice Galloway: Well, they would be books that are in evidence here?

Mr. Stein: Yes. Certainly.

Mr. Kern: Yes. Subject to my objection.

Justice Galloway: Yes. 1790

Justice Breslin: You should identify them, however,—

Mr. Kern: Yes.

Justice Breslin: —in the stipulation.

Mr. Stein: Yes. What I will do now —I don't know them offhand—

Justice Gassman: And your name?

Proposed Witness: Shaller, S-h-a-l-l-e-r, Oscar, 2271 Knapp Street.

Justice Breslin: And your business?

Proposed Witness: Bookbinding.

Justice Breslin: Where is your place of business? 1791

Proposed Witness: 40 West 17th Street, Manhattan.

Justice Breslin: Sit down.

Mr. Stein: I have here two books which are bill books of Mr. Shaller, which contain separate bills, three on a page, for different work he has done. Each of these bills is separately numbered.

I also have a sheet from his ledger books, accounts payable, the entire book of which he has in court.

1792 *People's Witness, Oscar Shaller, Direct*

What I should like to do is refer from the ledger sheet which bears the—which is in the name of the account "Automatic Offset, 37 West 20th Street", turn to the appropriate page in the bill books and read the titles.

Justice Breslin: The stipulation is getting a little involved. Better proceed.

Stand up.

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1793

OSCAR SHALLER, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: All right. Be seated. Please keep your voice up. What is your name?

The Witness: Oscar Shaller.

Court Officer: Your address?

The Witness: 2271 Knapp Street.

Court Officer: Your business or occupation?

The Witness: Bookbinding.

Court Officer: Where is Knapp Street?

1794 The Witness: Brooklyn.

*Direct Examination by Mr. Stein:*

Q. Mr. Shaller, have you ever bound any books for Mr. Norman Levenberg under an account named "Automatic Offset," 37 West 20th Street? A. Yes.

Q. Now, I show you a sheet of paper; and I ask you if this is a sheet extracted from your ledger book indicating the binding you have done for Automatic Offset? A. Yes, it is.

Q. And this sheet would cover what period of time, sir? A. From March 27, 1958, to November 15th—no, November 13, 1958.

Q. And is this ledger sheet kept in the regular course of business? A. Yes, it is.

Q. Is it your regular course of business to keep this ledger sheet? A. Yes.

Mr. Stein: I offer it in evidence.

Mr. Kern: I object to it on the ground it is irrelevant, immaterial, not binding on this defendant. 1796

Justice Breslin: All right. Overruled. It is received—

Mr. Kern: I respectfully except.

Justice Breslin: —as People's Exhibit 92. (So marked.)

Q. Mr. Shaller, you maintained bill books, did you not, which have bills on them for the various jobs you do? A. Yes, I do.

Q. You write out two copies of each bill, is that correct, sir? A. That's correct.

Q. The original you give to the person for whom you do the job, and you maintain a carbon 1797
copy of those bill books, is that correct? A. That is correct.

Q. Now, do you keep those bill books in the regular course of business? A. Yes.

Q. And is it the regular course of business for you to keep such bill books? A. Yes.

Q. I show you one book with the words "May '58—October '58"; and I ask you if this is one such bill book for that period of time? A. Yes.

Q. I show you another bill book with the words "November 14, '57 to April 30, '58"; and I ask you if this is still another bill book— A. Yes.

Q. —for that time? I also show you one bill with the name "Automatic Offset" and the date October 13, '58, on it; and I ask you whether this is a single bill which you cut out of a third bill book which you presently have here? A. Yes, it is.

Q. Is this slip of paper, as well as the book from which you cut it, kept in the regular course of business? A. Yes, it is.

Q. Is it the regular course of business for
1799 you to keep this book and this slip? A. Yes.

Mr. Stein: I offer the bill book—

Justice Gassman: Instead of offering it, perhaps you can get a stipulation now that on such-and-such a date he bound the book entitled so-and-so consisting of so many pages, without waiving your objection that you had to—

Mr. Kern: I am perfectly willing to do that.

Mr. Stein: Except, Your Honor, the only way to get to the names of the books these
1800 refer to in the ledger book is through the bills themselves.

Justice Gassman: Well, the bill, I assume, would state the name of the book which was bound.

Mr. Stein: I won't know which book to turn to without that ledger sheet.

Justice Breslin: Take the ledger sheet—

Mr. Kern: Counsel can read them into the record, as far as I am concerned, all subject to my objection, without binding this defendant.

Justice Gassman: You can give the date of the bill, the name of the book, the number of pages.

Mr. Stein: All right. Along with Mr. Kern's stipulation, I shall, myself, read the name of the books, and so forth.

Bill Number 3621 is a bill for Automatic Offset dated March 27 of 1958, two thousand books entitled "Satin Satellite".

Justice Gassman: What title?

Mr. Stein: "Satin Satellite". Do you 1802
want the price, Your Honors, or just—

Justice Breslin: Yes.

Mr. Stein: Price is $88.00. Is that correct?
The Witness: $88.00, that's correct.

Justice Gassman: Are the number of pages listed in that bill?

Mr. Stein: 80 pages.

Justice Gassman: 80?

Q. 80 pages, that's correct. Is that right? A. That's correct, 80 pages.

Mr. Stein: 3658 is a bill dated April 1803
7th of 1958—

Justice Gassman: June what?

Mr. Stein: April 7.

Justice Gassman: April 7, 1958.

Mr. Stein: 1958, for a book entitled "Queen Bee", twenty-five—

Justice Gassman: That is 72. Yes?

Mr. Stein: —twenty-five hundred books, 176 pages, $161.25.

Justice Gassman: Yes?

Mr. Stein: Bill Number 3784, for a book entitled "Bound Martially—Order of the Day"—

Justice Gassman: Well, wait a minute. That is not one of the books here.

Mr. Stein: Yes, "Bound Maritally—Order of the Day". "Bound Maritally—Order of the Day", Exhibit 10.

Justice Gassman: The date is what?

Mr. Stein: 1,250 books, $80.00.

Justice Gassman: How many pages, and what date?

Mr. Stein: The date is May 13 of 1958.

1805 The Witness: 128 pages.

Mr. Stein: 128 pages.

Also on the same bill, a book, "Intense Desire", 1,250 copies, 96 pages. The total bill, $80.00 for the first book, Exhibit 10, $70.00 for the second book.

Justice Gassman: Date? Same date?

Mr. Stein: Same date, Your Honor.

Justice Gassman: Yes.

Mr. Stein: Bill Number 3798, dated May 14, 1958, for a book entitled "Columns of Agony"—

1806 Justice Gassman: What exhibit is that?

Court Officer: That's Number 43.

Mr. Stein: "Columns of Agony", May 14, 1958, 1,250 books, 168 pages, $100.00.

Bill Number 3816, for a book entitled —this is not for a book which is in evidence.

Bill Number 3854, June 3, 1958, "The Sex Switch"—

Justice Gassman: The name is what?

Mr. Stein: "The Sex Switch".

Court Officer: It is Number 40.

Justice Gassman: Four?

Mr. Stein: 40.

Justice Galloway: Four-owe.

Justice Gassman: 40.

Mr. Stein: 5,000 books, 24 pages.

The Witness: 24, yes.

Q. And for "Sex Switch", how much? A. $65.00.

Mr. Stein: $65.00.

Justice Gassman: How many pages?

Justice Galloway: 24. 1808

Justice Gassman: 24.

Mr. Stein: Bill Number 3869, June 9, 1958, "Queen Bee", 1,200 books. There is $74.88.

The Witness: Well, there are two different books, then. "Queen Bee" is $88.00.

Mr. Stein: $88.00?

The Witness: Yes, sir.

Mr. Stein: Bill Number 3935, June 30, 1958, "Stud Broad"—

Justice Gassman: Exhibit?

Mr. Stein: 71. 71. 2,500 books, $187.50, 1809 176 pages.

3960, July 10, 1958, "Hollywood Spankers"—

Justice Gassman: What exhibit is that?

Justice Galloway: That is 41.

Mr. Stein: $51.00, 3,000 books.

The Witness: 3,000 books, 32 pages.

Mr. Stein: But "Hollywood Spankers" is one of three listed. 3,000 altogether of three-titled books, only one of which we are concerned with.

Justice Gassman: How many pages?

Q. 32 pages, is that correct? A. 32, yes, sir.

Mr. Stein: And $51.00 for the three books.

Bill Number 4017—4017, "Dance With a Dominant Whip"—

Justice Gassman: Exhibit what?

Mr. Stein: Do you have it there?

Justice Galloway: I don't think that's—

1811 Mr. Stein: Is that not one of the books on this?

Justice Galloway: Yes, that is Exhibit Number—

Justice Breslin: Eleven.

Justice Galloway: —11.

Mr. Stein: Eleven. July 31 of 1958, 1,000 books, $46.00, 96 pages.

4050, August 12, 1958, "Impact", Exhibit 2, 2,500 books, 144 pages, $155.00.

Also on the same bill— "Queen Bee".

Q. That would indicate a second print bind-

1812 ing, is that correct, sir? A. Yes, it would.

Mr. Stein: Exhibit 72. 1,020 books, $75.00, 176 pages.

Bill Number 4109, August 29, 1958— Well, that is for a book which is not in evidence, Your Honor.

Bill Number 4121, "Smooth and Sassy"—

Justice Galloway: Thirty-seven.

Mr. Stein: —September 4, 1958, 5,000 books, 48 pages, $75.00.

Justice Breslin: How many more do you have?

Mr. Stein: There are about ten, Your Honor.

Mr. Stein: 4121—

Justice Breslin: You just had 4121.

Mr. Stein: Oh. 4131, "Her Highness", Exhibit 5, I believe, September 9, 1958, 2,500 books, 128 pages, $150.00.

4150, "Strange Passions"—

Justice Gassman: That is Number 8.

Mr. Stein: —September 12, 1958, 1,120 books, 80 pages, $60.00. 1814

On the same bill, "The Whipping Chorus Girls"—

Court Officer: Number 9.

Mr. Stein: —1,100 books, 80 pages, $60.00.

Bill 4195, "Tattle Tales"—

Justice Gassman: What?

Mr. Stein: "Tattle Tales". That is Number 38, and also sixty-something, I believe.

Court Officer: And 66.

Justice Galloway: —six.

Mr. Stein: "Tattle Tales", 1,800 books, 1815 on September 29, 1958, $45.00, 64 pages.

Bill 4216 is a book we are not concerned with.

4350, "The Violated Wrestler",—

Court Officer: 27.

Mr. Stein: —October 13, 1950, 2,500 books, 144 pages, $175.00.

Mr. Kern: 1950, did you say?

Mr. Stein: 1958. I'm sorry.

Mr. Kern: Oh.

Mr. Stein: Mr. Kern, will you stipulate that the information I have just read

into the record, as found in the witness's books, which I have described, are kept in the regular course of business, and so forth?

Mr. Kern: I will stipulate that he would testify to that.

Mr. Stein: That he would so testify?

Mr. Kern: Yes, but this is all subject to my objection on the grounds which I indicated, and the Court gives me an exception.

1817

Justice Breslin: Yes. And the objection is overruled.

Mr. Kern: Thank you.

Mr. Stein: Thank you very much.

Justice Breslin: No questions?

Mr. Kern: Just one.

*Cross Examination by Mr. Kern:*

Q. You don't know this defendant—Mishkin—at all? A. No, I do not.

Q. Never saw him? Never spoke with him?

1818 A. No.

Q. And did you read any of these manuscripts or these papers that were bound by you? A. No.

Q. You just bind them up mechanically by means of a machine? A. That's right. That's correct.

Mr. Kern: All right. That's all.

Mr. Stein: All right. Thank you, sir.

Your Honors, I have one additional witness, who did not bring his records, who can testify from memory very briefly.

Justice Gassman: Not today.

Mr. Stein: Not today? All right.

Justice Breslin: We will take a recess until ten—

Mr. Kern: I am just beginning to feel young and vigorous. I would like to go on working and finish this case.

Justice Breslin: —ten-thirty tomorrow morning.

(This is to Certify that the foregoing is a 1820
true and correct transcript of the within proceedings as recorded by me.)

PAUL H. PETERSON
Official Court Reporter

1821

1822 *Colloquy*

COURT OF SPECIAL SESSIONS
OF THE CITY OF NEW YORK,

PART III—NEW YORK COUNTY.

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THE PEOPLE OF THE STATE OF NEW YORK

*against*

1823 EDWARD MISHKIN,

*Defendant.*

Cal. No. 10

Inf. No. 5014/60

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*Continued Trial*

On: October 28, 1960
At: 100 Centre Street,
New York 13, N. Y.

Before:

1824 Hon. Edward F. Breslin,
Presiding Justice;
Hon. Benjamin Gassman,
Hon. Edward T. Galloway,
Associate Justices.

Appearances:

For the People: Melvin Stein, Esq., Assistant District Attorney, New York County.

For the Defendant: Michael Kern, Esq., 37 Wall Street, New York, N. Y.

Court Officer: Continued trial, number 10, Edward Mishkin!

Mr. Stein: If your Honors please, Mr. Kern and I yesterday agreed to stipulate to the testimony of one witness, a binder, and I ask Mr. Kern if this stipulation is agreeable to him: If one Lawrence De-Nino would testify, he would testify that he is a binder at the York Bindery in New York county, that he bound a book entitled Female Sultan, People's Exhibit 1826
Number 3, sometime in the month of November, 1959, and that he bound approximately 2,500 copies of that book and received $64 for it.

Justice Galloway: Who requested it?

Mr. Stein: At the request of Mr. Norman Levenberg, and that he billed the Norman Offset firm for that binding job, that he also did another group of bindings for Mr. Levenberg and billed the Norman Offset firm, this group consisting of the so-called black and white books
we have offered in evidence, specifically, 1827
People's Exhibits 14 through 20, inclusive, and 46 through 56, inclusive, and that he bound most of those editions during the month of November, 1959, having received the material for them from Mr. Levenberg in approximately August of 1959, and doing the job in August, September, October, and most of it in November, and giving portions of the completed job to Mr. Levenberg a little at a time, as Mr. Levenberg requested.

1828

Justice Breslin: What's his name again?

Mr. Stein: Lawrence DeNino.

Justice Breslin: And his address?

Mr. Stein: His address is 546 80th Street in Brooklyn. Excuse me, his address is 37 West 20th Street, the York Bindery Corporation.

Justice Breslin: You will stipulate, Mr. Kern, that he will testify to that effect without conceding the truth of his testi-

1829 mony?

Mr. Kern: That is correct, your Honor, that he will so testify, except for these two objections, which I have been making right along. First of all, that anything this witness DeNino did—and these objections have been entered on the record since the start of the trial—was for and at the request of Levenberg, not of the defendant, and without any contact with this defendant and that such testimony is not binding on this defendant and is therefore irrelevant and immaterial and

1830 not binding on this defendant. That's my first objection. Secondly, as to dates, I think at the beginning of the testimony of one of these supporting witnesses, some of them were prior to two years before the date of the Information and I asked I be allowed a blanket objection and exception and the Court said that was so. Now I didn't repeat this objection made at the beginning of the testimony of the witness Billgrow, a young man who said he was an artist, and it goes for that witness too, I understand?

Justice Breslin: Yes.

Mr. Kern: And I have my objection and my exception as I do to this stipulated testimony?

Justice Breslin: Yes.

Mr. Kern: Thank you very much.

Mr. Stein: May I make one correction to the stipulation, if it's all right; that Mr. DeNino first received the books in September, rather than in August.

Justice Breslin: September of '59. 1832

Mr. Stein: Through November.

Justice Galloway: And that Mr. DeNino did not know Mr. Mishkin?

Mr. Stein: I will so stipulate; that's correct. Your Honors, at this time I offer in evidence as People's Exhibit 91, a certified copy of a Certificate of Incorporation—

Justice Gassman: You're past 92. This should be 93.

Justice Galloway: 91 is the mortgage agreement and 92 is the ledger sheet of Oscar Shallow. 1833

Mr. Stein: I'm sorry, your Honor. I offer in evidence as People's Exhibit number 93 a certified copy of a Certificate of Incorporation filed in the Clerk's Office of New York County for Main Stem Books, Inc.

Mr. Kern: May I see it?—I object to it on the ground that it's irrelevant and immaterial and incompetent to prove anything required of the prosecution by virtue of the Information and any count contained in the Information.

1834 *Colloquy*

Justice Breslin: What's the purpose of it?

Mr. Stein: Your Honor, testimony has previously been adduced concerning a seizure of at least one item of evidence, I believe People's Exhibit Number 68, at the Main Stem Book Store.

Mr. Kern: In January, 1960.

Mr. Stein: I recall Mr. Kern asking each person whether the defendant Mr.
1835 Mishkin was present. I intend to show, firstly, by this offer, that Mr. Mishkin was listed as a stockholder of this corporation and also as an officer at the time of the formation of the corporation, and that its purpose was to publish, print and distribute books, and that he remained an officer of the corporation down through the period of time set forth in the Information.

Justice Breslin: You can't show it through this.

Mr. Stein: Through the next witness,
1836 but this at least shows he was an officer when it was incorporated.

Justice Gassman: What is the date of the certificate?

Mr. Stein: The certificate was filed September 15, 1958.

Justice Breslin: We'll receive it.

Mr. Kern: There was a seizure in January, 1960. He may have owned this shop in '57 or '58, but he had no connection with it during the period set forth in the Information.

Justice Breslin: The right is still reserved to you to strike it out if it's not properly connected. Received in evidence.

(Certificate of Incorporation of Main Stem Books, Inc., is received and marked People's Exhibit No. 93 in evidence.)

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ROBERT S. TYSON, called as a witness by the People, having been first duly sworn, testified as follows: 1838

Court Officer: What is your name?

The Witness: Robert S. Tyson.

Court Officer: Your home address?

The Witness: 530 DuBois Avenue, Valley Stream, New York.

Court Officer: And your business or occupation?

The Witness: I'm an attorney.

Court Officer: Keep your voice up, please.

*Direct Examination by Mr. Stein:*

1839

Q. Mr. Tyson, you are associated with a law firm in New York County, is that correct? A. Yes, sir.

Q. And the name of that law firm, sir? A. Sincerbeaux & Shrewsbury.

Q. That's located at 55 Liberty Street, is that correct? A. Yes, sir.

Q. And is your firm related or in some way associated with the corporation, 1603 Broadway Realty Company, Inc., of the same address? A. Yes, we're the attorneys for that corporation.

1840 Q. And indeed, sir, you set up the corporation, is that correct? A. Yes, we did.

Q. And are you, sir, an officer in that corporation? A. I am, I'm the secretary.

Q. You've been the secretary since 1937? A. Yes.

Q. Does that corporation control certain real estate located at 1603 and 1607 Broadway? A. Yes, it does. It's the net lessee.

Q. And do those premises include a store
1841 immediately next to and north of the entrance of the Trans Lux Theatre known as the Main Stem Book Store? A. Among the stores in the building of which the corporation is the lessee is a store just to the north of the theatre entrance which was at one time leased to Main Stem Books.

Q. Now, sir, I ask you if you know the defendant in this case, Edward Mishkin? A. I recall seeing him on one occasion, yes.

Q. And approximately when was that, sir? A. That was in September of 1958.

Q. And did you enter into any negotiations
1842 with Mr. Mishkin at that time? A. Mr. Mishkin was present at a conference that I attended and which he was represented by an attorney, and also there was a mister, I believe his name was Schenkman, an associate of his, and also a Mr. Ringle, who is the building manager of our building at Broadway and 49th Street.

Q. Do you remember the name of the attorney that was present? A. No, I do not.

Q. Now, sir, what did those negotiations concern? A. They concerned a prospective leasing by Mr. Mishkin and his associate of the store known by the number 1607 Broadway, which is

located just north of the theatre entrance in our building.

Q. Was a leasing of the store consummated on that day, sir? A. No, it was not.

Q. Was a leasing of the store consummated at any other time? A. At some later date a lease was entered into between the corporation and Main Stem Books.

Q. Sir, I now show you a piece of paper from which I remove an additional piece of paper which is stapled to the top and I ask you, sir, 1844
whether you can identify this piece of paper? A. Yes. This is a lease of that store, which I prepared and signed on behalf of the corporation.

Q. And your signature appears on there, is that correct? A. It does.

Q. Do you recall when you signed it? A. I believe that I signed it sometime after the initial meeting with Mr. Mishkin and that it was thereafter delivered to Mr. Mishkin at the time he signed and I was not present on that occasion.

Q. You were not present on that occasion? A. 1845
I was not.

Q. Now there's a signature immediately below yours, under the words Main Stem Books, Inc., by. What signature is that?

Mr. Kern: I object to any reading from a document not in evidence.

Justice Breslin: Sustained.

Mr. Stein: At this time I offer this document in evidence, subject to further connection, as Exhibit 94.

1846 *People's Witness, Robert S. Tyson, Direct*

Mr. Kern: I object to it on the same ground as stated in connection with Exhibit 93.

By Justice Breslin:

Q. What did you do with the lease, sir, after you signed it? A. I delivered it to an associate in my office, because the following day I had to go out of the city and was gone for several days and I left it to him to continue
1847 the negotiations with respect to the leasing of this store, so I signed it and delivered it to my associate.

Q. Mishkin had not signed the lease to that point? A. He had not.

Q. You don't know when it was signed? A. I do not.

Justice Breslin: Mark it for identification. Objection sustained.

(One paper is marked People's Exhibit 94 for identification.)

Q. Who was the associate you delivered it
1848 to? A. John F. Lydon.

Q. Is he still with your concern? A. Yes, sir.

*Direct Examination by Mr. Stein (Continuing):*

Q. Mr. Tyson, I show you another document and ask you if you can identify this, sir, this being the document from which I removed a staple, that was previously attached to People's 94 for identification. A. Yes, this is a letter which I prepared and signed.

Q. And what does the letter concern, sir?

Mr. Kern: I object.

Justice Breslin: Sustained.

Q. Mr. Tyson, at one time did you negotiate an assignment of the lease for the Main Stem Book Store to another organization? A. Well early in 1960 we accepted an assignment of the lease and entered into an assignment of a lease to a new tenant, the one who is now in possession of that store.

Q. And from the period that the original lease was negotiated with the Main Stem Book Store 1850
and Mr. Mishkin, to the time of the assignment of that lease, did the Main Stem Book Store and Mr. Mishkin remain the lessee of the premises with which we're concerned?

Mr. Kern: Just a minute. There's no evidence anywhere that Mr. Mishkin entered a lease with Main Stem Books.

Justice Breslin: Sustained.

Q. Up to the time the lease was negotiated with the Main Stem Book Store, from that time until the time that you negotiated an assignment 1851
of that lease, as you say, sometime in February, in early 1960, was there any organization other than Main Stem Book Store which remained the lessee of that store? A. No, they were the only lessee to my knowledge during that period, that corporation.

Justice Breslin: Who was your managing agent for that period of time?

The Witness: We have an agent, a salaried agent, who has an office in the building, but the greater part of the management details for the

1852 building are handled down in our office, such as the collection of rents and sending out rent bills.

Justice Breslin: Are the rents paid at your office?

The Witness: Yes, they are paid at our office by mail.

Q. Now, sir, at the time that you negotiated the assignment of the lease from Main Stem to another corporation, did you prepare any document consenting to that assignment? A. Yes,
1853 I did.

Q. I show you this document and ask you if you can identify this? A. Yes, that's the—

Justice Breslin: No, no, yes or no.

A. Yes.

Q. What is it, sir? A. This is the letter which I prepared consenting to an assignment of the lease from Main Stem Books to Phil's Book Shop, Inc.

Mr. Stein: I ask at this time that this be marked merely for identification as
1854 People's Exhibit Number 95.

Justice Breslin: What was the date of that?

The Witness: February 18, 1960.

Justice Breslin: That will be marked 95 for identification.

(One paper is marked People's Exhibit 95 for identification.)

Mr. Stein: May we have this marked People's Exhibit 96 for identification.

Justice Breslin: So marked, a piece of paper.

(One paper is marked People's Exhibit 96 for identification.)

Q. Sir, I show you People's Exhibit 96 for identification. Can you identify that? A. Yes.

Q. What is that, sir? A. This is a document that I extracted from our office files maintained in connection with the operation of this building.

Q. The building with which we're concerned? A. Yes.

Q. Are those files kept in the regular course of business? A. Yes, sir.

Q. And is it the regular course of busines of your firm to keep such files? A. It is. 1856

Q. And when did you extract those particular copies from your files, sir? A. Several days ago, at my first meeting with you.

Q. And to whom did you deliver it, sir? A. I delivered it to you.

Mr. Stein: I have no other questions of this witness.

*Cross Examination by Mr. Kern:*

Q. Mr. Tyson, when you were first notified to appear at the District Attorney's office and learned that it was in connection with the leasing of these premises at 1603-1607 Broadway, you naturally looked into your files to acquaint yourself with the whole situation, is that right? A. Yes. 1857

Q. And in your files you found a complete record, a complete history of the relationship between the landlord and the owner of the building, represented by you, and Main Stem Book Store, is that correct? A. These are the files. I found the lease and this other document.

1858 Q. Did you learn at any time, Mr. Tyson, that this defendant was connected with Main Stem Book Store until January, 1959, and not thereafter? Did you learn that? A. I'm not sure that I understand the time element.

Q. All right. Did you learn that the defendant was connected with Main Stem Books for only four months after entering into the leasehold with you? A. I have no knowledge as to the period of time, no, sir.

1859 Q. Did you make any record of the persons who signed checks for rentals for the rent of the premises? A. No, I didn't maintain any such record.

Q. Is there any way, Mr. Tyson, in which you can now acquaint yourself with the names appearing on rent checks for four or five months after the leasehold was signed, and every month since then down to February, 1960? A. No, we don't have any record as to signatures on corporate checks that would have come in for payment of rent for this store or for any of the other stores.

1860 Q. I see. Where were checks for rent paid? Can you tell me that? A. Yes. They were mailed to the corporation at our office address at 55 Liberty Street, and our cashier-bookkeeper handled mailing out notices and receipt of checks and deposited them in the corporation's account.

Q. And there would be no memoranda on any record maintained by your office as to who signed the checks? A. There is no such record. We maintain no such record, no, sir.

Q. Mr. Tyson, the fact is you never saw this defendant in Main Stem Books? A. I beg your pardon?

Q. You never saw this defendant in the Main Stem Book Store? A. In the store?

Q. At the premises? A. I saw him once at the building before the lease was entered.

Q. But certainly in the month of January, 1960, you never saw him? A. No, sir.

Q. You just saw him when the lease was entered into? A. Yes, sir.

Q. Not after that? A. No, sir.

Justice Gassman: Was that in the store?

The Witness: In the building. He was in the 1862
agent's office.

Justice Gassman: Did you at any time after the lease was signed see the defendant in that store?

The Witness: No, sir, I never did.

Justice Breslin: Did you ever go in the store?

The Witness: I don't think I was ever in that store myself.

Q. Can you, Mr. Tyson, give us the name of any individual who might know or would know of the name or names that was signed on checks for monthly rentals of that particular store? A. 1863
No, sir.

Q. Did Mr. Stein discuss that matter with you? A. No.

Q. Never asked you who signed the checks for rent? A. No.

Mr. Kern: That's all.

1864 *People's Witness, Robert S. Tyson, Re-direct*

*Re-direct Examination by Mr. Stein:*

Q. I have one question. I believe I asked you this question, Mr. Tyson, in my office. Do your files contain any communications or any notations of any sort from any person indicating Mr. Mishkin's severance with any possible connection with the Main Stem Book Store up to February 18th of 1960, sir?

Mr. Kern: That's objected to.

1865 Mr. Stein: Your Honors, I offered in evidence certain documents relating to the original leasing of the premises. Mr. Kern has asked questions concerning whether or not the defendant ever severed any relations with that firm.

Mr. Kern: I never asked him any such question.

Mr. Stein: Well I won't argue with you, but Mr. Kern asked the witness whether or not in his files there are any communications indicating that Mr. Mishkin was related to Main Stem Books for only a four-

1866 month period after the negotiation of the original lease.

Mr. Kern: Yes.

Mr. Stein: Now the witness has already testified that he maintains in the regular course of business certain records relating to those premises. Now if those records did not contain any notation that a particular individual has severed his original connection with that firm, with those premises, then I think we can draw an inference that he has not done so.

Justice Breslin: You can draw no such inference and I don't think it's a logical inference.

Mr. Stein: I think it's a fact which the Court may take into consideration.

Justice Breslin: That there is nothing in his file which indicated that Mishkin severed his relationship, if any, with the corporation with whom he entered into a lease, is that your point?

Mr. Stein: Yes.—The objection is sus- 1868
tained, I take it?

Justice Breslin: Did you finish your question?

Mr. Stein: I did, your Honor.

Mr. Kern: The Court said there was no such inference.

Justice Breslin: Suppose you withdraw your question.

Mr. Stein: Yes, question withdrawn.

Q. Do your records, sir, contain all items received by your firm concerning the leasing of the premises 1603 and 1607 Broadway? A. Yes, 1869
they do.

Q. You have entered into negotiations with the defendant at one time for the leasing of those premises, is that correct? A. Yes.

Q. Do the records which you have on file indicate that the defendant is at all associated with the Main Stem Book Store?

Mr. Kern: When, may I ask? Objection.

Justice Breslin: Sustained.

1870 *People's Witness, John F. Lydon, Jr., Direct*

Q. Do you have any records indicating—records kept in your file, sir, which indicate that at the time of the leasing of the premises by Main Stem Books, the original leasing, that the defendant was connected with the Main Stem Book Store? A. Yes, at the time—

Q. Do you have that? A. Yes, at the time of the making of the lease he appears as an officer.

Mr. Kern: I object. There's a written
1871 communication.

Justice Breslin: Sustained.

Mr. Stein: All right, I'll withdraw this line of questioning.

Justice Breslin: I think the question comes back to whether there was anything in the files which indicated the defendant had severed his relation with the corporation and you objected.

Mr. Kern: I objected.

Justice Breslin: That objection is sustained.

1872

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JOHN F. LYDON, JR., called as a witness by the People, having been first duly sworn, testified as follows:

Court Officer: What is your name?
The Witness: John F. Lydon, Jr.
Court Officer: Your home address?
The Witness: 180 Kingston Avenue.
Court Officer: Where is that?
The Witness: South Floral Park, Long Island.

Court Officer: And your business or occupation?

The Witness: I'm an attorney.

*Direct Examination by Mr. Stein:*

Q. Mr. Lydon, you're associated with the firm of Sincerbeaux & Shrewsbury, is that right? A. Yes.

Q. And I ask you, sir, whether in early 1958, in September, 1958, you entered into certain negotiations for the leasing of the premises 1603 1874
Broadway in New York County? A. I did.

Q. Have you ever seen the defendant in this case, Edward Mishkin, before? A. The gentleman on the right.

Q. The gentleman on your right? A. Yes.

Justice Breslin: Indicating the defendant.

Q. Have you ever seen him before? A. Yes, I have.

Q. Did you see him sometime in September of 1958? A. Yes, I did, sir.

Q. Where did you see him? A. At 1603 Broad- 1875
way.

Q. Which particular part of that premises, sir? A. I saw him up in one of the executive offices. I think it was up on the third or fourth floor and I saw him in a vacant store, I think the number is 1607 Broadway.

Q. And did you have any conversation with him in that vacant store at 1607 Broadway?

Mr. Kern: Now, if the Court please, I respectfully object on the grounds which were previously mentioned and further,

1876 to be more specific, on the ground that we're concerned in the Information now before this Court for trial with the question of possession, either actual or constructive or any other type of possession, by direct or circumstantial evidence, on one day in the month of January, 1960. Counsel now calls for a conversation in the month of September, 1958. I respectfully submit it has no bearing at all upon the issues of this case.

1877 Justice Breslin: Overruled.

Mr. Kern: Exception.

Q. Did you have such a conversation with him, a conversation with him? A. Yes.

Q. Will you describe the conversation to the best of your recollection, sir. A. Well the first conversation up in the building—

Q. Go ahead, the one in the building first. A. The first conversation was up in the offices of the building with Mr. Ringle, this gentleman here, Mr. Mishkin, another gentleman and an

1878 attorney and it was regarding in general the terms of the lease.

Q. Do you recall any participation by the defendant in that conversation? A. Yes. All three of the gentlemen spoke with me.

Q. What do you recall about what the defendant may have said? A. Well the negotiations were on the right to assign and sublet. We wanted control over that, and that was the main thing that was discussed.

Q. What did the defendant have to say, to the best of your recollection? A. Well both he and the other two gentlemen wanted this right to assign and sublet the lease.

Q. Do you recall anything else about the conversation with the defendant at that time? A. We also discussed the possibility of free rent for a couple of weeks, when they would get possession.

Q. Well did the defendant talk to you about who was getting possession?

Mr. Kern: Now counsel is leading of course.

Justice Breslin: Sustained. 1880

Q. Do you recall anything further about your conversation with the defendant? A. The only other thing was there was a corporation to be formed.

Q. What do you recall about your conversation with the defendant on that point? A. It was a question of whether the lease could then be signed up and whether they were waiting for word from Albany that the certificate of incorporation had been filed.

Q. Do you recall anything this defendant said to you about that? A. I couldn't tell you whether it was said by him or by his attorney or by 1881 the other gentleman.

Justice Breslin: What's the other man's name? Ringle?

The Witness: Mr. Ringle is the building manager for the 1603 Corporation.

Justice Breslin: Was there some other man there?

The Witness: There was another man there who was interested in making the lease.

1882 *People's Witness, John F. Lydon, Jr., Direct*

Q. Do you recall anything else, Mr. Lydon, concerning your conversation with the defendant? A. Up in the executive offices?

Q. Upstairs. A. That's all.

Q. You recall nothing else at this point concerning your conversation? A. No.

Q. Do you recall whether the defendant spoke to you at all concerning his relationship to the people who were leasing the premises?

Mr. Kern: I respectfully submit he's
1883 leading continuously.

Mr. Stein: If your Honor please, if I may submit, I have asked the witness whether he recalls anything else concerning his conversations with the defendant and he has said no. I believe I have exhausted his recollection and have a right to lead him at this point.

Mr. Kern: I submit he has no such right.

Mr. Stein: It's an elementary rule of evidence.

1884 Justice Galloway: Ask him about the conversation in the store and maybe—

Mr. Stein: I would prefer to handle one premises at a time. I exhausted the witness' recollection.

Justice Breslin: He hasn't indicated that. You know what the rule of law is. The objection is sustained.

By Justice Breslin:

Q. Do you recall any further conversation you had up in the executive offices? A. No, I don't.

Q. Now later on you had a meeting in a vacant store— A. That's right.

Q. —which was the subject matter of this discussion? A. That's right.

Q. How long after was that? A. It was either the afternoon of the day we met upstairs or a day later.

Q. All right. Whom did you meet in the store? A. I met this gentleman here, the defendant Mishkin, and the other gentleman. I know his name was Schenker or Schenkman.

Q. Schenker or Schenkman? A. That's right.

Q. Those two? A. That's right. 1886

Q. What conversation did you have in the store? A. I was in the midst of dispossessing the prior tenant and the prior tenant had left wallboard and racks for hanging records and books. I wanted to know whether or not these gentlemen wanted that stuff left there or whether the marshal should throw it out along with the rest of the stuff, and they indicated to me—

Mr. Kern: Objection. They, he says.

Q. What did this defendant say, if anything? A. I can't say whether he said it or whether Schenker said it. 1887

Q. There was some discussion about leaving some property there? A. One of the gentlemen told me what property they would like left there and what I can have the marshal throw out in the line of encumbrances.

*Direct Examination by Mr. Stein (Continuing):*

Q. At any event, you're certain the defendant was in the premises at that time? A. Yes.

1888 *People's Witness, John F. Lydon, Jr., Direct*

Q. Mr. Lydon, I show you People's Exhibit Number 96 for identification and I ask you whether you can identify this? A. Yes, I can.

Q. What is that, sir? A. This is a letter that I had Mr. Ringle type out to cover the fact that they were going—

Mr. Kern: I object to any reference to the contents.

Justice Breslin: Sustained.

1889 Q. Are you in any way related with that document, sir? A. Am I related with it?

Q. Do you have anything to do with it? A. I dictated it.

Mr. Stein: At this time, your Honors, I am going to offer in evidence, subject to further connection, the documents which are marked for identification. I wish to state to the Court the sum total of the evidence to be presented on this point so that the Court may make an appropriate ruling at this time. These documents,

1890 People's Exhibits 94, 95 and 96 for identification, are offered in evidence for the purpose of connecting the defendant with the Main Stem Book Store. The only offer of proof I can make is that the defendant was associated with the store at the time the premises were leased and that he was listed as a stockholder and officer of the corporation in an article of the certificate of incorporation that was filed with the county clerk. I can also show through the county clerk that there was no change or no additional articles of

incorporation ever filed with the county clerk indicating a change of officers.

Justice Gassman: Wait a minute. Is there anything in the corporation law that requires a corporation to file with the county clerk a record of new officers elected?

Mr. Stein: I must confess my ignorance on that point.

Justice Gassman: May I say there isn't. It's strictly a matter shown in the corporation minutes. Haven't you got the witnesses who actually saw the execution of that lease, Exhibit 93 in evidence? 1892

Mr. Stein: Your Honor, I can show this is in the handwriting of the defendant, surely. However, these documents relate to a period in September of 1958 and I can certainly show that the defendant signed these documents.

Mr. Kern: May I offer a solution to this problem, in the interests of justice. The District Attorney, being an officer of the Court, if he will help the defendant and subpoena and get a certain witness here by the name of Mr. Glaser, who is an attorney associated with Mr. Daniel Weiss, he would testify that this defendant severed all interest in the Main Stem Book Store four months afterwards. If you'll call Mr. Glaser on the phone, you'll get him down right away, and that will be it. 1893

Mr. Stein: If Mr. Glaser will so testify, then these documents will then become admissible.

Mr. Kern: That's correct.

Mr. Stein: I offer these in evidence.

Mr. Kern: I object to the receipt of these articles.

By Justice Breslin:

Q. Were you present when that lease was signed, sir? A. I don't recall, your Honor.

Q. Well the last witness testified, Mr. Tyson, that you signed that lease in behalf of the landlord of the premises and that he left town and gave the lease to you to have executed, to Mr. Lydon.

Justice Galloway: He said he gave it to Mr. Lydon.

Q. To be executed. Do you recall that? A. I can't say, your Honor, it was left with me to be executed, because when I came into this picture this deal was dead and I went up there to have more hearings on it, more negotiations, so it wasn't left with me for execution.

Q. Were you present at the time this defendant signed? A. I do not remember, your Honor.

Justice Breslin: Mr. Kern, Mr. Stein, will you come up here, please.

(Off the record discussion had at Bench.)

Mr. Stein: Mr. Kern, do you have any other questions?

Mr. Kern: Nothing at all.

Mr. Stein: At this time I withdraw my offer in evidence. May I make those arrangements now?

Justice Breslin: Surely, we'll give you five minutes. Recess.

(Recess.)

Mr. Kern: Now, if the Court please, Mr. Stein and I have discussed this and I think we understand one another and we're ready to enter into a stipulation that will avoid a great deal of delay in other respects, as well as in connection with the matter that is immediately before the Court. First of all, I am willing to stipulate, and I will stipulate, that the defendant did execute the documents which was described as a lease of premises 1607 1898
Broadway, New York City, in the month of September, 1958, and that he did execute this lease—

Justice Gassman: That's Exhibit 94 for identification?

Mr. Kern: Exhibit 94 for identification, and that he did execute this lease on behalf of, or as an officer of Main Stem Books, Inc., that corporation being named as the tenant, and 1603 Broadway Realty Company, Incorporated, being named as the landlord.

Justice Gassman: That was in Septem- 1899
ber of 1958?

Mr. Kern: September of 1958, the defendant executed it as an officer of Main Stem Books, Inc; further, the District Attorney is willing to stipulate, and does stipulate, I assume, that if Mr. Sidney Glaser, an attorney of law associated with an attorney at law of the name of Daniel Weiss, took the witness stand, he would testify that about four or five months after the execution of this lease, the

1900

lease referred to in People's Exhibit 94 for identification, concerning which I have just made a statement into the record—

Justice Gassman: That's four or five months after September, 1958?

Mr. Kern: Yes, that he appeared as attorney for this defendant, Edward Mishkin, and represented him in a transaction, as a result of which the defendant executed whatever papers were necessary to

1901

sever his relationship with Main Stem Books, Inc.

Mr. Stein: May we just add, to formally sever his relationship.

Mr. Kern: Yes, to formally, F-O-R-M-A-L-L-Y, sever his relationship.

Justice Gassman: That's a general statement. When you stipulate he formally severed his relationship, it doesn't convey much.

Mr. Kern: He divested himself of the stock interest and had nothing further to do as an officer, director, or financial in-

1902

terest in the corporation.

Mr. Stein: I won't stipulate to that.

Justice Breslin: First of all, take the first part of the stipulation, as to the lease. You're willing to stipulate as far as that lease is concerned?

Mr. Kern: Yes.

Justice Breslin: That's not tied up with any subsequent stipulation?

Mr. Kern: Except one is based on the other.

Justice Breslin: Did you call Glaser?

Mr. Stein: We called Glaser. He's unavailable at the present time.

Justice Galloway: Mr. Kern, would the stipulation be satisfactory if the District Attorney stipulated that Mishkin divested himself of the stock of the corporation, is that satisfactory, if he stops there?

Mr. Kern: Yes, divested himself of the stock and ceased to be an officer of record.

Mr. Stein: On paper.

Justice Galloway: That's four or five 1904
months after the lease was entered into, you stipulate to that?

Mr. Stein: Yes.

Justice Breslin: Now, are you offering the lease?

Mr. Kern: We're also willing to stipulate, in order to avoid the necessity of calling a handwriting expert from the Police Department, that the writings on—

Justice Galloway: First, let's do it this way. We have 95 for identification, which was a letter dated February 18, 1960.

Justice Breslin: What about the lease? 1905

Mr. Stein: The lease, People's Exhibit Number 94 for identification is offered in evidence.

Justice Breslin: You make the usual objections so far as the time element is concerned?

Mr. Kern: That is correct.

Justice Breslin: All right, the objection is overruled. We'll take it as People's Exhibit 94 in evidence.

(Lease is received and marked People's Exhibit No. 94 in evidence.)

1906 *Colloquy*

Mr. Kern: Instead of offering another document and encumbering the record that way, may I further stipulate that if a witness connected with the 1603 Broadway Realty Company, Incorporated, were called by the District Attorney, he would testify that Main Stem Books, Inc., assigned its lease on February 18, 1960, to Phil's Book Shop, Inc.

Mr. Stein: In other words, that Main Stem was the lessee until that time?

1907 Mr. Kern: Yes.

Mr. Stein: I so stipulate, if that's all right with the Court.

Justice Breslin: Yes.

Mr. Kern: Here's Mr. Glaser now.

Mr. Glaser: Somebody called my office.

Mr. Stein: The foregoing stipulation, your Honor, eliminates the necessity of my offering in evidence 95 for identification, so I do not do so.

Justice Galloway: What was 96?

1908 Mr. Stein: 96 was a piece of paper.

Mr. Kern: Do we need Mr. Glaser?

Mr. Stein: No, I don't think so. Will you stipulate that the signature, Edward Mishkin, on People's Exhibit 96 for identification is the signature of the defendant and was written by the defendant?

Mr. Kern: I wouldn't mind doing that, but this would encumber the record when the statement itself, the paper itself is immaterial. It has no bearing. We agreed that he, as an officer of the corporation, leased this premises. This is simply an

acknowledgement that they've taken the premises and have three weeks grace to move in.

Mr. Stein: This is as equally relevant as the lease to show Mr. Mishkin's initial connection with the premises.

Mr. Kern: We have conceded that.

Justice Gassman: You've got the lease here which is signed by Mishkin as President of Main Stem.

Mr. Stein: Yes, and this adds just a 1910
little bit more concerning Mr. Mishkin's duties as president of Main Stem.

Mr. Kern: I don't mind if the Court will look at it. I'm sure the Court will agree with me it adds nothing.

Justice Breslin: It's not received. You're withdrawing that?

Mr. Stein: I'll withdraw that. Now Mr. Kern and I have entered into agreements concerning the testimony of a handwriting analyst, and this stipulation will perhaps take a minute because I do want to offer some documents in evidence as 1911
part of the stipulation so that they may be part of the record. Mr. Kern, will you stipulate that if Lieutenant Joseph McNally of the Police Laboratory of the New York City Police Department would testify, he would testify he examined the signature Edward Mishkin which appears on People's Exhibit 91, a mortgage extension—

Justice Gassman: That's the mortgage of the Staten Island Savings Bank?

1912

Mr. Stein: Yes, your Honor, and also examined the signature Edward Mishkin which appears on a piece of cardboard I now ask be marked 97 for identification, and that he also examined the printing on the same card, the handwriting and the handwriting on said card, this being a card filled out by the defendant on March 9th, the date of his arrest, at the 5th Precinct, the station house.

1913

Mr. Kern: Yes.

Mr. Stein: And that the printing and handwriting on these two documents were then compared with the printing and handwriting on other documents. Now may we just break into the testimony of Lieutenant McNally to ask whether he will stipulate that the signature and printing on People's Exhibit 97 for identification is that of the defendant.

Mr. Kern: That he will testify that in his opinion—

Mr. Stein: This is a known specimen.

1914

Mr. Kern: That he would testify that this document was signed by the defendant, this signature was placed on this arraignment card by the defendant on the occasion of his arrest in this case.

Justice Gassman: That's Exhibit 97 for identification.

(One card is marked People's Exhibit No. 97 for identification.)

Justice Breslin: There's some other printing that you're concerned with?

Mr. Stein: Yes, your Honor. I already inquired about that.

Mr. Kern: The handprinting was placed thereon by this defendant.

Mr. Stein: Yes. I'm sorry to do this, your Honors, it will just require an additional half minute, but I should like to go into the stipulation anew because I have not done it properly. I will ask, first, if you stipulate that Lieutenant Richard Dimler of the First Deputy Police Commissioner's Office, that if he were here, he would testify that in his presence on 1916
March 9th at the 5th Precinct Station House, and within the station house the defendant put all the handprinted items and all the handwritten items which appear on People's Exhibit 97 for identification.

Mr. Kern: I will so stipulate.

Justice Breslin: Stipulating a standard of comparison.

Mr. Stein: And I believe that Mr. Kern yesterday stipulated that as to the mortgage extension, People's Exhibit 91, the signature Edward Mishkin was indeed 1917
written by the defendant. That stipulation was entered into yesterday.

Mr. Kern: That's correct.

Mr. Stein: Now, Mr. Kern, will you stipulate if Lieutenant Joseph McNally of the Police Laboratory of the New York City Police Department would testify, he would testify he compared the signatures Edward Mishkin, which appear on People's Exhibits 91 and 97 with People's Exhibits 73-C through C, three slips of paper—

1918 *Colloquy*

Justice Breslin: Exhibit what?

Mr. Stein: Exhibits 73-A through C, A, B and C, three slips of paper.

Justice Galloway: Those are slips that he said were given to him by defendant.

Mr. Stein: That's correct, and the handwriting on these slips A, B and C, is the same and written by the same person as Edward Mishkin on People's Exhibits 91 and 97.

1919 Mr. Kern: I will stipulate he will so testify.

Mr. Stein: And will you further stipulate that Lieutenant McNally would testify he compared the handwriting on People's Exhibits 91 and 97 with People's Exhibit 74, a contract which the witness testified he entered into with the defendant, and that the signature Edward Mishkin is in the handwriting of and is written by the same person who signed the name Edward Mishkin on People's Exhibits 91 and 97?

1920 Mr. Kern: The defendant will so stipulate.

Mr. Stein: And will you further stipulate that if Lieutenant Joseph McNally of the Police Laboratory of the New York City Police Department were here, he would testify that he compared the printing on People's Exhibit 97 with the printing on People's Exhibits—with the printed word "Okay" on People's Exhibits 77-A, 77-B, also the word okay on 77-C, the word okay on 77-D, the word or letters okay on 77-E, the word or letters okay Ed,

E-D on 77-F and that a comparison of these six exhibits with the printing on Exhibit 97 indicates that the words okay and okay Ed were written by the same person who printed, handprinted the card People's Exhibit 97.

Mr. Kern: We will concede that he will testify as to the letters okay and okay Ed, they were placed thereon, in his opinion, by the defendant.

Mr. Stein: I believe that that is all the 1922
stipulations as to handwriting.

Justice Breslin: Will you stipulate as to his qualifications?

Mr. Kern: Lieutenant McNally, oh, yes.

Mr. Stein: As an expert in the matter of questioned documents.

Mr. Kern: Yes.

Justice Breslin: We'll take a recess to 2:15.

(Luncheon recess.)

1923

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Mr. Kern: I wonder if the Court would indulge me with regard to this request: I have a witness who I wanted to call, he's got to be back at work at five minutes after three. I understand the District Attorney has just about 10 or 15 minutes more; of course it's not exactly proper during the People's case to call a defendant's witness; if the Court will help me, I'd like to get this man out.

Mr. Stein: He's spoken to me about the witness. It's perfectly all right.

Justice Breslin: There's no objection to Mr. Kern calling this witness?

Mr. Stein: No, Judge.

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WILLIAM WALSH called as a witness by the defendant having been first duly sworn testified as follows:

Court Officer: What is your name?

The Witness: William Walsh.

Court Officer: And your home address?

The Witness: 409 East 72nd Street.

Court Officer: Where is that?

The Witness: New York City.

Court Officer: And your business or occupation?

The Witness: Salesman.

*Direct Examination by Mr. Kern:*

Q. Mr. Walsh, you're now employed as a salesman, is that correct? A. That is right.

Q. You're married? A. That is right.

Q. Have you ever been convicted of any crime? A. Just for in the store there, with the books.

Q. You had some books? A. That is right.

Q. You pleaded guilty? A. That is right.

Q. In this Court? A. Well in Magistrates Court.

Q. You paid a fine? A. That's right.

Q. And that was the only time? A. That's right.

Q. And that was sometime ago? A. Yes.

Q. How long ago? A. About '54 or '55.

Q. Now, Mr. Walsh, were you ever employed by Keystone-Kingsley Book Shop or Kingsley Book Store? A. Yes, sir.

Q. And they were located where? A. 220 West 42nd Street.

Q. And you were a clerk there or a salesman? A. A salesman.

Q. Did you know Mr. Norman Levenberg? A. Yes.

Q. Of Norman Offiset Company? A. Yes, sir. 1928

Q. Did you ever see him in the Kingsley Book Store? A. Yes.

Q. How many times about? A. About 8 or 10 times or more.

Q. What did you see him do when he came there? A. Well he came in with a package.

Q. Packages of books? A. That's right.

Q. Did you ever see him get paid, receive a check from your employer? A. Well he used to hand me the invoice. I said, "That will be taken care of—"

Justice Gassman: A little louder, please.

1929

A. When he brought in his merchandise there he used to hand me the invoice and I said, "Well, that will be taken care of by the owner."

Q. You mean he asked for a check in payment? A. In other words he handed me the invoice and I put it in the register and I just said, "That will be taken care of."

Q. Who was your employer at that time, by the way? A. Mr. Martin Kleinberg.

Q. Martin Kleinberg? A. Right.

Q. Did you see Mr. Martin Kleinberg on any occasion give him a check? A. No, I never did.

1930 *People's Witness, Bernard Abrams, Direct*

Q. Do you know if he was selling merchandise on his own account or for anybody else? A. No.

Q. You didn't know that? A. No.

Mr. Kern: That's all.

Mr. Stein: No questions.

Mr. Kern: Go ahead with your case. This is the only witness I have right now.

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1931

BERNARD ABRAMS, called as a witness by the People, having been first duly sworn, testified as follows:

Court Officer: What is your name?

The Witness: Bernard Abrams.

Court Officer: Your home address.

The Witness: 315 Ellen Place, Jericho, Long Island.

Court Officer: And your business or occupation?

The Witness: Accountant, Public Accountant.

1932 *Direct Examination by Mr. Stein:*

Q. Mr. Abrams, are you the accountant for the Publishers Outlet Corporation? A. Yes, sir.

Q. Are you the accountant for the defendant? A. I'm the accountant for Publishers Outlet.

Q. And I ask you, are you also the accountant for the defendant? A. In the respect that I have done his tax returns once a year.

Q. So you are an accountant for the defendant? A. Yes, sir.

Q. How long have you been an accountant for the Publishers Outlet Store? A. Since it started business in 1957, I believe.

Q. Do you handle the payroll for the Publishers Outlet Store? A. Yes, sir.

Q. And when do you handle the payroll? A. When do I handle the payroll?

Justice Galloway: That word "handle", you know.

Mr. Kern: Do you want a concession he was employed by the Publishers Outlet? We'll concede it.

Mr. Stein: Well, let's do it this way: May I have this book marked for identification. 1934

Justice Breslin: People's Exhibit 98 for identification.

(One book is marked People's Exhibit No. 98 for identification.)

Q. I show you People's Exhibit 98 for identification, sir. Can you identify that? A. Yes, sir.

Q. What is it? A. This is the payroll book for Publishers Outlet for the year 1958.

Q. And how far in that year does it extend? A. It goes from the beginning of the year 1935 through the end of the year.

Q. Did you maintain that book in the sense of making entries therein? A. Yes, sir.

Q. And did you make all entries in that book? A. Did I make all the entries? Yes, sir.

Q. And have you also maintaned the payroll books for the Publishers Outlet firm for the year 1959? A. Yes, sir.

Q. And similarly for the year 1960 up to and including—well up to December 29 of 1959, you maintained the books for Publishers Outlet, is that right? A. Yes, sir.

1936 *People's Witness, Bernard Abrams, Direct*

Mr. Stein: Now I offer this book in evidence.

Mr. Kern: I object to it. May I just say, my impression is that the document offered in evidence must serve some purpose that's pertinent to the issues in the trial. Now I can't see the pertinency. This is a book maintained by Publishers Outlet. It has no connection with the defendant. If the prosecutor wants to prove that the defendant was employed by Pub-
1937 lishers Outlet, we'll admit that.

Mr. Stein: Your Honors, let me ask the witness another question.

Justice Galloway: Do you withdraw your offer at the moment?

Mr. Stein: Yes.

Q. Does the name Edward Mishkin appear anywhere in this exhibit? A. Yes, sir.

Q. And where does it appear? A. It appears along with the other employees of the store.

Q. And, sir, which of the employees in the store received the highest salary, according to
1938 this book?

Mr Kern: I object to that.

Justice Breslin: Sustained.

Mr. Stein: I offer the book in evidence. In line with my offer, I note that this book was marked for identification when Detective Hartigan testified that they took this from the Publishers Outlet Store. I just asked it be marked People's 98 for identification. I withdraw that since it was already marked People's 76 in evidence for identification.

Justice Breslin: All right. You withdraw the offer as 98 and it's 76 in evidence. We'll take it.

Mr. Kern: Exception.

(One payroll book is received and marked People's Exhibit No. 76 in evidence.)

Q. Mr. Abrams, for the period 1959 down through December 29th, 1959, was the defendant Edward Mishkin also listed as an employee of the Publishers Outlet Store in your payroll book? 1940
A. Yes, sir.

Q. And can you tell us the salary which he was getting?

Mr. Kern: I object to that.

Justice Gassman: Doesn't the book speak for itself?

Mr. Stein: Not for 1959. The only one I have is 1958. I'm now asking if the book lists the defendant in 1959.

Mr. Kern: I object to it on the ground it's not the best evidence. I also object to it on the ground it's incompetent, irrele- 1941
vant and immaterial.

Justice Breslin: Sustained.

Q. Mr. Abrams, have you ever been in the Publishers Outlet Store? A. Yes, sir.

Q. Have you ever seen the defendant in that store? A. On times, yes, sir.

Q. Well how often do you go to the Publishers Outlet Store? A. Usually once a month, sometimes more, usually once a month.

Q. Would that be on any given part of the month, sir? The beginning or the end of the month? A. The beginning of the month.

Q. And do you do your work on the books of the Publishers Outlet at the store itself? A. No, sir.

Q. Approximately how long do you spend at the store while you're there? A. Maybe 10 or 15 minutes when I'm getting all the data I need and then another 10 or 15 minutes after I return.

Q. Do you come any particular time of the day? A. Yes, sir.

Q. What time? A. The evening.

1943 Q. Can you give us an approximation of the time? A. Any time between 5 and 6.

Q. Do you know the hours the store remains open? A. I believe—I'm never there when it's closed. I know it remains open to 12 or one o'clock, something like that.

Q. Now you've been to the store then at least once a month for the past two years, or for the period say from April of 1958 down through December 29, 1959, is that correct? A. Yes, sir.

Q. Now could you tell us roughly how many of the times you were there you saw this defendant in the store? A. Possibly twice.

1944 Q. Possibly twice during that entire period, is that correct? A. Yes, sir.

Q. During the two times that you did see the defendant there was he performing any work at the store, sir? A. I don't know what you mean by work.

Justice Gassman: What was he doing there during the two times that you saw him?

A. As far as the two times that I might have seen him in the store, watching customers.

Justice Galloway: Who gave you the books and records to take over to your office? Who'd give them to you?

The Witness: Mr. Harvey Revo.

Justice Galloway: What was his job?

The Witness: Mr. Revo was president of the corporation.

Q. And Mr. Revo is also listed as an employee in that book with a salary next to his name? A. Yes.

Q. You say you saw the defendant watching customers. Did you ever see the defendant waiting on customers? A. I can't say whether I have or not. It's so rare that I see Mr. Mishkin 1946
in the store because at the time I come in it might be at the time when the shifts are changing and he's going on.

Q. But you've seen him there approximately twice? A. I'm trying to answer you to the best of my memory.

Q. Is your answer you haven't seen him more than twice? A. I don't believe I have, in the period you stated.

Q. And yet each month when you make up the payroll, you put his name—

Mr. Kern: I object to the form of the 1947
question, and yet.

Justice Breslin: Sustained.

Q. Mr. Abrams, you've had conversations with the defendant on many occasions? A. It depends on your interpretation of many occasions.

Q. You've had conversations with the defendant, have you not? A. Yes, sir.

Q. Did you ever speak to him at all in relation to the Publishers Outlet Store? A. I'm not quite clear on your question.

1948

Q. Did you ever talk to him about the Publishers Outlet Store? A. All the business I do with the store is with Mr. Revo and prior he had a partner before this, with the other owner of the store who is no longer there.

Q. Did the defendant ever speak to you, Mr. Abrams, about his connection with the store? A. No, sir.

Q. Never talked to you about it, did he? A. No, sir.

1949

Q. Now this past Saturday you received a subpoena at your home, did you not? A. Yes, sir.

Q. What did you do after you received the subpoena? A. I went back to bed.

Q. Did you make a phone call? A. No, sir.

Q. Did you get in touch with the defendant between Saturday and today? A. Did I get in touch with the defendant between Saturday and today? Yes, I saw the defendant on, I think it might have possibly been Tuesday.

Q. Purely by chance or did you get in touch with him? A. I had stopped into the store to

1950

see Mr. Revo regarding some other matters.

Q. And you had not contacted him at all between Saturday and Tuesday, is that right? A. That's the first time I saw him.

Q. I ask you whether you contacted him, sir. By that I mean by phone, by intermediaries, by any other medium. You understand that? A. No, I did not contact him. I spoke to him on Tuesday.

By Justice Breslin:

Q. Where? A. At the store.

Q. What store? A. Publishers Outlet.

Q. Last Tuesday? A. Tuesday of this week.

*Direct Examination by Mr. Stein (Continuing):*

Q. What was he doing at the store by the way? A. I have no idea what he was doing at the store. He works there as far as I know.

Q. Did you see him waiting on any customers? A. At that time, no.

*Cross Examination by Mr. Kern:*

Q. You know who the bosses are, don't you, of Publishers Outlet? A. Yes. 1952

Q. Who are they? A. At the present time, Mr. Harvey Revo.

Q. And who were the bosses before that? A. Mr. John George and Mr. Harvey Revo.

Q. Did you ever know this defendant to be the owner or part owner of Publishers Outlet, Incorporated? A. No, sir.

Q. The defendant works days, doesn't he? A. Yes, sir.

Q. You get there at night?

Mr. Stein: Objection. The witness has already testified he don't know when the 1953 defendant works there.

Q. I will ask you: Do you know whether the defendant works days or nights? A. He works days.

By Justice Galloway:

Q. How do you know that? A. Because whenever I am in at night he is never there, and speaking to Mr. Revo, who is the owner, he tells me he's one of the employees.

1954 *People's Witness, Bernard Abrams, Re-direct*

Q. And what is Mr. Revo's salary? A. At the moment—

Q. In 1959? A. Two hundred a week.

Q. And what is Mr. Mishkin's salary? A. Two hundred a week, I believe.

Mr. Kern: With respect to your Honor's question, I respectfully object.

Justice Gassman: Don't those figures appear in this time book?

Mr. Stein: That's '58.

1955 Justice Galloway: I asked for '59.

Justice Breslin: Overruled.

Q. What is the salary? A. In 1959?

Q. Yes. A. I believe two hundred a week.

Q. And what was it in 1958? A. I think it was $175 a week.

By Justice Breslin:

Q. This record, People's Exhibit 76 in evidence, indicates for example that on January 7th of '58, that particular week that Revo's salary was one hundred dollars a week and Mishkin's

1956 salary was one hundred and seventy five dollars a week, is that right? A. Yes, sir.

Q. And you say Revo was the real owner of the place, is that right? A. Yes, sir.

*Re-direct Examination by Mr. Stein:*

Q. Just one further question. As far as you know Harvey Revo is Edward Mishkin's boss, is that right, he's his boss? A. Yes, sir.

Mr. Stein: Any further questions?

Mr. Kern: No.

Mr. Stein: You can leave, Mr. Abrams.

JAY DREYER, called as a witness by the People, having been first duly sworn, testified as follows:

Court Officer: What is your name?
The Witness: Jay Dreyer.
Court Officer: Your home address?
The Witness: 510 West 112th Street.
Court Officer: And your business or occupation?
The Witness: I'm a salesman for the Berkley Publishing Corporation. 1958

*Direct Examination by Mr. Stein:*

Q. Mr. Dreyer, where is the Berkley Publishing Corporation located? A. At 101 Fifth Avenue.

Q. Sir, would you just sit back, please, and try to speak, when you answer my questions, so I can hear you at this point where I'm standing. A. Right.

Q. Sir, how long have you been a salesman with the Berkley Publishing Company? A. Over three years now.

Q. Do you know the defendant in this case? 1959
A. Yes, I've seen him.

Q. Have you ever done any business with the Publishers Outlet Store? A. Yes.

Q. Approximately what time period did you do business with the Publishers Outlet Store? A. Well from about, exactly September to the end of December, 1957, and then I resumed called on the account again in '59, about May; May, it was.

Q. Yes. A. To July, and then the last contact I had was July, which I took an order which was not accepted.

Justice Gassman: July of what year?

Q. What year? A. 1959.

Q. Forget about the order. A. Okay.

Q. Will you confine your answers to my questions, sir. In the last period you just stated, May of 1959 to July of 1959, approximately how often did you personally visit the Publishers Outlet Store during that time period? A. About twice a month.

Mr. Kern: I object to it on the ground it's irrelevant, immaterial and incompetent.

Justice Breslin: Overruled.

Mr. Kern: I call the Court's attention to the fact that this defendant is charged with the possession of these books in January, 1960.

Justice Breslin: Yes. Overruled.

Mr. Kern: I respectfully except.

Q. About how many times? A. About twice a month during that period.

Q. Did you ever see the defendant in the store? A. Yes, I saw him there.

Q. Approximately how many times, sir? A. I would say about half of the times I saw him there. About once a month at least.

Q. And that would be how many times in all during that time period? A. In that time, about four, five times.

Q. Would you describe what you saw the defendant do while you were in the store?

Justice Galloway: If anything.

Mr. Kern: I object to that as irrelevant and immaterial.

Justice Breslin: Overruled.

Mr. Kern: Exception.

A. Well I would come into the shop with my sample kit and Mr. Mishkin would be standing on the side of the shop and I might nod to him, he might nod to me. I never spoke with him, and he would stand there and then I would go over to one or two of the other men, men I used to know as Frank and Harry and I would attempt to sell them the books.

Q. Not Mr. Mishkin? A. Not Mr. Mishkin. 1964

Q. Go ahead. A. There was only one time that I ever approached Mr. Mishkin directly with my samples was when one of the clerks said to me—

Mr. Kern: Now I object to any conversation.

Justice Breslin: Sustained.

Mr. Kern: May I ask for a date, if counsel intends to pursue it further.

Q. Sir, approximately when did that incident take place? A. I would say the second month that I started to sell.

1965

Justice Breslin: Was that back in '57?

The Witness: No, this is '59.

Justice Gassman: The first month you say was in May?

The Witness: The first month, but this was in June. It wasn't the first month when I started calling on him again. It was later.

Justice Gassman: What month was it you say you talked to this defendant, you say you approached him?

The Witness: In June.

1966 By Justice Breslin:

Q. On that occasion you spoke to an employee in the place? He said something? A. That's right.

Q. Then what happened? A. Then I went over with my covers and I gave them to Mr. Mishkin and he sort of rifled through them very rapidly and he handed them back to me without comment, and then I went back to try and sell it to his clerk or the men in the store.

1967 Mr. Kern: I move to strike out the words, "his clerk".

Justice Galloway: You went back to the clerk.

The Witness: Yes.

Justice Breslin: Strike out the word his.

*Direct Examination by Mr. Stein (Continuing):*

Q. You say you saw Mr. Mishkin in the store about four occasions, is that right, sir? A.
1968 About that.

Q. And I asked you earlier to describe his behavior, the things he did, if anything, on those occasions, and you mentioned just one incident you just described? A. That's right.

Q. Can you tell us anything else about his behavior in the store on the four occasions you were there, sir?

Mr. Kern: I object to this.

Justice Gassman: You mean behavior or activity?

Mr. Stein: His activities.

Mr. Kern: I object to that.

Justice Breslin: Overruled.

Mr. Kern: Exception.

A. Well I remember one incident in which he nodded his head to a clerk on the floor toward a customer who was over near some books that were in cellophane wrapping and the clerk then went over and asked the man if he could help him with the purchasing of the books.

Q. Well, sir, what would Mr. Mishkin be doing, if anything, in the store. He would be 1970
there? A. Just standing, and the men who worked in the shop would come over to him and ask him questions which I never heard.

Mr. Kern: I object to this. He was asked about one specific incident and he said the men would do this and do that. Now I ask that he say what he actually did.

Justice Breslin: Sustained. Strike that out.

Q. Sir, is there anything you recall at the present time concerning anything the defend- 1971
ant himself did, any of his activities while he was in the store?

Mr. Kern: May I ask for a date?

Mr. Stein: On any of those four occasions.

Mr. Kern: May I ask for a date?

Justice Galloway: A date was set between May, June and July in 1959.

Mr. Kern: I think I'm entitled to a specific date from a witness who is testifying from his recollection.

1972 *People's Witness, Jay Dreyer, Direct*

Justice Breslin: If you can recall?

The Witness: Well it's difficult, because what I'm about to describe happened almost every time I was there.

Justice Breslin: How often did you go there during the months of May, June and July, 1959?

The Witness: Twice a month, approximately.

Justice Breslin: Twice a month?

The Witness: At least.

Justice Breslin: Throughout those three months?

1973 The Witness: At least.

Q. Sir, you said whenever you went there the same thing happened? A. Right.

Q. I take it then you mean on each of the four occasions you saw the defendant? A. Right.

Q. Now will you tell us, sir, what you mean by the same thing happening? A. The clerks in the store would approach Mr. Mishkin and talk to him and whisper to him and he would listen, cock his ear and then he would turn, he would pick his head up and they would walk away.

Q. Sir, did you ever see any of the clerks or
1974 Mr. Harry Revo give an order to this defendant?

Mr. Kern: Oh, I object to that.

Justice Breslin: Sustained.

Q. I ask you, sir, if you'll be good enough to step down from the witness chair and look at People's Exhibits 1 through 72 which are spread on these two tables. Will you do that, sir. A. Yes.

Q. Please look at them carefully. A. Okay.

Q. Will you sit down. Sir, did you ever sell any of these books to Mr. Mishkin? A. No.

Q. Did you ever sell any of these books to anyone? A. No.

Q. To your knowledge does the Berkley Press Publishing Company have anything to do with these books in any form or fashion? A. No, not at all.

Mr. Stein: You may inquire.

*Cross Examination by Mr. Kern:*

Q. Publishers Outlet made its purchases of books from Book Sales, Incorporated, isn't that so? A. Well— 1976

Q. Did they or didn't they? A. Yes, as far as I know.

Q. They didn't just like doing business with Berkley Books, isn't that correct, as far as you were concerned? A. Oh, no, that is not correct at all.

Q. On the occasions you were in the store was very rarely you say, once or twice a month? A. That's right.

Q. By the way, how many men were on the floor or other people connected with Publishers Outlet? A. Usually two. 1977

Q. Never more than two? A. Sometimes one or two other men whom I did not know.

Q. And the two included this defendant? A. I would say yes; yes.

Q. So there was only one man in that store besides the defendant when you were there? A. There were two clerks plus one or two other men.

Q. Then there were about four people, three or four people there when you arrived? A. Sometimes yes, sometimes no.

Q. Does that include the defendant or exclude him? A. It includes him.

Q. Did you ever see one clerk walk over and talk to another clerk or didn't they talk to one another? A. Yes, they would call to each other.

Q. Did you ever see Mr. Mishkin talk to some clerk or call to a clerk? A. No.

Q. But you did see someone, some clerk walk over and talk to Mr. Mishkin, is that correct? A. Yes.

Q. Just as one clerk would walk over and talk to another clerk? A. No.

Q. You saw them talk, is that correct? A. With Mr. Mishkin it was whispered and with each other it was open.

Q. And do you know Mr. Revo? A. Yes.

Q. Is he the owner of the place? A. I don't know.

Q. Was he always there when you arrived? A. Sometimes.

Q. Did you ever offer to sell your books to Mr. Revo? A. Yes.

Q. You never offered to sell any books to this defendant, did you? A. No.

Q. You didn't talk to him about books? A. No.

Q. Your thought was that you would talk to someone about purchasing books from you, someone in authority? A. Someone who did the purchasing of books.

Q. Someone whom you thought had the authority to purchase books, isn't that right? A. Right.

Q. And that's why you never spoke to the defendant about buying your books? A. I was told—

Mr. Kern: Objection, this is hearsay.

Justice Breslin: It's responsive.

Mr. Kern: I asked this witness if his thought was to sell books to someone in authority and he said yes and I asked isn't that why you never spoke to the defendant, yes or no.

Justice Galloway: I'm not certain you did say yes or no.

Justice Breslin: Read back the last question.

(Reporter reads back pending question and answer.) 1982

Mr. Kern: Whether I did or didn't, your Honor, it's immaterial because of the language in which my last question was couched, and he said, "I was told."

The Witness: He didn't hear the end of my statement.

Justice Galloway: Mr. Kern, you said to the Court that you asked a question and followed it up with yes or no.

Mr. Kern: I withdraw that, I'm in error. I'll withdraw the question. 1983

Q. You said that your thought was to sell your books or offer your books to someone who had the authority to make the purchase, is that right? A. Right.

Mr. Kern: That's all.

1984 *People's Witness, Jay Dreyer, Re-direct*

*Re-direct Examination by Mr. Stein:*

Q. Did you ever see Mr. Mishkin sell a book or wait on a customer? A. No.

Mr. Stein: That's all. Thank you very much. Your Honors, Mr. Kern, People rest.

Mr. Kern: Well, I should like to reserve my motions until the close of the whole case, if the Court will permit me
1985 to.

Justice Breslin: Come up, Mr. Kern, Mr. Stein.

(Off the record discussion at Bench.)

Justice Breslin: All right, we'll take a recess now until 12 o'clock Monday.

Certified to be a true and correct transcript of minutes in this case.

ARNOLD S. ROTHBARD, C.S.R.,
Official Court Reporter.

(Seal.)

1986

1987

Court Officer: Eight—Edward Mishkin.

Justice Breslin: Good morning.

Mr. Kern: Good morning, Your Honors. I am sorry I was a bit late, but I just finished up there.

Justice Breslin: It is quite all right.

Mr. Kern: I have just one witness now.

Justice Gassman: You reserved your motion at the end of the People's Case.

Mr. Kern: Yes, I reserved at the end of the People's case. I think that is already in the record.

1988

Justice Breslin: Well, you rested, did you not?

Mr. Stein: Yes, we closed our case.

Justice Breslin: All right.

Mr. Stein: There was only one minor point that occurred to me. Mr. Kern, when we stipulated as to the expert witness I think that we stipulated that you would concede his qualification—

Mr. Kern: Yes.

Mr. Stein: —as to the question of documents.

1989

Mr. Kern: Yes.

Mr. Stein: I assumed that you would stipulate to those qualifications as to being an expert in that field?

Mr. Kern: Yes.

Justice Breslin: As a handwriting expert.

Mr. Kern: Yes, as an expert.

Mr. Stein: That's right.

Justice Breslin: All right.

Mr. Kern: Adler? Where is Adler?

1990 *Defendant's Witness, Frank Adler, Direct*

FRANK ADLER, having been called as a witness, was first duly sworn, and testified as follows:

Court Officer: Be seated. Keep your voice up. What is your name?

The Witness: Frank Adler.

Justice Gassman: Frank what?

The Witness: Adler, A-d-l-e-r.

Court Officer: What is your address?

The Witness: 255 West 43rd Street, New York
1991 City.

Court Officer: What is your business or occupation?

The Witness: I'm retired right now.

*Direct Examination by Mr. Kern:*

Q. Now, you live at the address you just gave, Mr. Adler, with your wife—and any family? A. Yes, a child.

Q. You have a child? A. Yes.

Q. You are retired, is that correct? A. Yes.

Q. What was your business before you retired? A. I had a book store.

1992 Q. You were in the business of buying and selling books, is that right? A. Yes, sir.

Q. And what was the name of your place of business? A. Metro Books.

Q. And where is it located?

Justice Gassman: Metro—? Pardon me.

The Witness: Metro Books. 1703 Broadway, New York City.

Q. Have you ever been convicted of any crime with reference to books— A. Yes.

Q. —or anything for that matter? A. At one time, yes, I had—I was convicted and fined $250.00.

Q. How long ago was that? A. Oh, about nine months ago.

Q. And you retired after that, is that correct? A. Yes, sir.

Justice Breslin: What was the conviction of, sir? What was the conviction of? You were convicted, you said.

The Witness: Having obscene books in a store.

Justice Breslin: All right. 1994

Q. Now, Mr. Adler, you know this defendant, do you not? A. Yes, sir.

Q. Do you know a man of the name of Norman Levenberg of Norman Offset Company? A. Yes, sir.

Q. Did you see and talk with Mr. Levenberg about—about a month or a month-and-a-half ago? A. Yes, sir.

Q. Where was that? A. On 42nd Street near 8th Avenue.

Q. Who was present at that conversation? A. Fellow by the name—they call him Roundee. He is known around 42nd Street. 1995

Q. Is his name Goldman? A. It could be, yes.

Q. But it is Roundee, is that right? A. Roundee. I know him as Roundee, yes.

Q. Now, were you with them, or did you meet them? A. I was alone, and he was with this Norman whatever—I can't recall the second name.

Q. Norman Levenberg. A. Levenberg. That's it. Yes.

Q. And there was a conversation, is that correct? A. That's right.

Q. All right. Will you tell the Court what the conversation was? A. This Roundee said to me, "This is—"

Justice Gassman: How do you spell that name?

Mr. Kern: Roundy, R-o-u-n-d-y.

Justice Gassman: Yes.

Mr. Kern: He was identified as Goldman.

Justice Gassman: Yes, I remember. Go ahead.

A. He said, "This is Norman. He wants to get Mishkin." He says, "You happened to know
1997 Mr. Mishkin. Maybe you can carry the message to him." So I said, "Well, if I can do anything to help anybody, I'll try to." So I says, "What do you want me to tell him?" He says,—

Justice Galloway: Who said?

The Witness: Norman.

Justice Galloway: Yes?

A. —He said, "Well, if Mishkin would give me enough money to leave town, I would leave town. I either would change my testimony or I would leave town, and I wouldn't testify." He says, "Could you carry that message to Mr.
1998 Mishkin?" I says, "Well, if you want me to carry it to him, I will." So I went to Mishkin—

Q. Thereafter, you talked with Mr. Mishkin, is that correct? A. Then, thereafter, I talked to Mr. Mishkin, yes.

Q. Now, was there anything else that Levenberg said in addition to that? A. Well, that's about as much as I can remember. I don't—that was the brunt of the conversation that he—

Q. Did Roundy, or Mr. Goldman, say anything after Levenberg said that? A. Oh, yes. He said—

Mr. Stein: Objection.

Q. Well, to Levenberg? To Levenberg?

Mr. Stein: I will withdraw the objection.
Justice Breslin: Overruled.

Q. Yes? Go ahead. A. He said, "Why did you want to testify against him?" He says, "Well," he says, "we had some difficulties and we didn't straighten them out, so that's the reason I testified."

Q. Well, did he say anything else about his 2000
own involvement? A. Er, yes. He said that he was in trouble and he wanted to leave town; if he had enough money, he would leave town. That was the main thing of the conversation.

Q. Nothing else was said in addition to that? A. Not that I recall, sir. That was the main thing that I carried the message to Mr. Mishkin.

Q. Did he say anything about his own involvement? A. Oh, yes. He told me that he was arrested and he was locked up for having these books in his possession.

Q. Did he say anything about his testimony? 2001
A. Well, as far as I can remember, that's what he said he would testify, he would change his testimony. That's the brunt of the conversation.

Mr. Kern: All right. That's all.

*Cross Examination by Mr. Stein:*

Q. Just a few questions, Mr. Adler. A. Yes.

Q. You said before when Mr. Levenberg approached you you said, "Well, if I can do anything to help anybody, I will," is that right? A. That's right.

2002 Q. And that's the reason you carried the message and that's the reason you are testifying here for Mr. Mishkin, is that right? A. Well, I thought he wanted me to carry a message, and I thought—I didn't know what the—if it would help anybody. I didn't know what the—

Q. Well, you just wanted to help people,—A. Yes.

Q. —is that right, sir? A. Well, in that particular case, yes.

2003 Q. Have you ever worked for Mr. Mishkin, Mr. Adler? A. No, sir.

Q. You never worked for Mr. Mishkin? A. (Witness shakes his head negatively.)

Justice Breslin: Did you see Mr. Mishkin after that conversation you had with Levenberg?

The Witness: Did I see him afterwards?

Justice Breslin: Yes?

The Witness: Well, I have seen him off and on.

Justice Breslin: "Did you see Mr. Mishkin," I said.

The Witness: Yes.

2004 Justice Breslin: When? The same day?

The Witness: Yes. He was around there. That's why he told me to approach him.

Justice Breslin: Where did you see Mr. Mishkin?

The Witness: He was at the Publishers Outlet Store.

Justice Breslin: And you met this other lad —Levenberg—at 43rd Street and 8th Avenue?

The Witness: 42nd near 8th Avenue.

Justice Breslin: Near 8th?

The Witness: Yes, sir.

Justice Breslin: How far from there is this book shop, the Publishers Outlet?

The Witness: Well, it is practically about 200, 300 feet, I imagine.

Justice Breslin: I see. What did he first say to you when he spoke with you, he wanted to get in touch with Mishkin?

The Witness: Well, this Roundy came over and approached me. He said, "This is a fellow by the name of Norman. He had some difficulty with Mr. Mishkin"— 2006

Justice Breslin: Yes?

The Witness: "—and maybe you could—he wants someone to carry a message to him."

Justice Breslin: I see. All right.

Q. Mr. Adler,— A. Yes, sir?

Q. —you stated before that Mr. Levenberg told you that he had been arrested for the possession of the books and he was in trouble and he wanted to leave town, right? That's what he said to you? A. Well, he didn't exactly say that. He said that he was in trouble.

Q. Did he say he had been arrested? A. That I don't exactly remember. I am— 2007

Q. You testified to this earlier. Were you correct or incorrect when you said he said he had been arrested? A. I am not sure.

Q. You were incorrect when you said that, is that right? A. It could be, yes. I am not sure.

Q. Mr. Levenberg, you state, also—that is, Mr. Levenberg said that he wanted to leave town or change his testimony, is that correct? A. Yes, sir, that's what he said. Yes, sir.

Q. Did you see him after March 9th, sir? A. No, sir.

Q. Did you have this conversation—What date did you have this conversation with him? A. Well, the exact date, I don't remember. It was about a couple of months ago.

Q. A couple of months ago? A. Yes.

Q. Now, if I told you that Mr. Levenberg had already testified in a Grand Jury by March 9th, and if I told you that Mr. Levenberg had a wife and four children, would your testimony still be that he either wanted to change his testimony or leave town? Yes or no?

2009

Mr. Kern: Never mind that. I object to that.

Justice Breslin: Sustained. Bad in form.

Mr. Stein: Sustained?

Justice Breslin: Yes.

Justice Gassman: Tell me this: Did you have the appointment to meet this man Roundy that day?

The Witness: No, sir.

Justice Gassman: Just met him by pure accident?

2010

The Witness: I just ran into him accidentally, sir.

Justice Galloway: Well, did you know this fellow before—Levenberg?

The Witness: Mr. Mishkin?

Justice Galloway: Levenberg?

The Witness: Oh, no, never met him before. No, sir.

Justice Galloway: Well, didn't you say to him, "why don't you deliver your own message to him"?

The Witness: No, sir, I didn't say that. No.

Justice Galloway: You didn't say that to him?

The Witness: No, sir.

Justice Galloway: Well, wouldn't that have been sort of a normal thing to say?

The Witness: Well, I—I don't know. I just thought that I carried a message, and I just didn't know if it would do any good or bad. I just carried the message. I thought that was the right thing to do. I don't know. Maybe I did wrong, but I—

2012

Justice Galloway: Didn't you say to him, "There's his book store over there. At that book store, you can find him. It is only a couple of hundred feet. Go up and tell him yourself or call him up"?

The Witness: Well, they were on the outs, I believe. That's why they weren't talking to each other. And when I carried the message to Mr. Mishkin, he said he didn't want to have anything to do with him, he is not interested in anything.

Justice Galloway: I see.

2013

Q. Mr. Adler, when Mr. Levenberg told you, you just went to Mr. Mishkin and carried the message, is that right? A. That's right.

Q. Now, what Mr. Levenberg was asking Mr. Mishkin to do was a terrible thing, wasn't it? A. Well, it must be. I imagine it is.

Q. Yes. It is a shakedown, isn't it? A. Well,—

Q. "I will lie or leave town if you pay me," isn't that it?

Mr. Kern: I object to that.

Justice Breslin: Sustained.

Q. But all you did, sir, was to go to Mr. Mishkin and deliver the message, right? A. Right. That's all I did, sir.

Q. Mr. Kern asked you something about whether you had ever been convicted of a crime before. A. Yes, sir.

Q. You left one out, didn't you? A. What was that one?

Q. Well, you tell me. How many times have you been convicted of a crime? A. Well, it is twice, yes. Twice.

2015 Q. Oh, you left one out before? A. Yes.

Q. Do you remember when that took place? A. Well, that was sometime ago.

Q. Would it have been '46? A. Could have been, yes, sir.

Justice Breslin: What was that for?

The Witness: That was for petit larceny, see. I had a $25.00 fine at the time. I was drinking. It was petit larceny.

Justice Breslin: Petit larceny?

The Witness: That's right.

2016 Justice Breslin: All right.

Q. Now, when you were convicted of violation of the pornography statutes of this state, what kind of books were involved? Do you remember? A. Well, they are obscene books.

Q. They were obscene books? A. Yes. I didn't have them in my store. They said that I sent the customer to a certain place that—where they were bought. Of course, I—I pleaded guilty, and that was it.

Q. There were nine cartons of books, right? A. Yes, sir.

2017

Q. And they had stories of people being beaten, sexual flagellation, and so forth, right? A. Yes, sir.

Q. And you told the police that the books were yours, right? A. No, I didn't say they were mine, They were—They didn't ask me if they were mine. They looked the person up that had these books. I didn't have these books in my store.

Q. I see. But they were yours, weren't they? A. No, sir, they weren't mine.

2018

Q. But you pleaded guilty? A. I pleaded guilty because they claimed that I sent the customer up to this particular person.

Q. I see.

Justice Breslin: All right. Is that all?

Mr. Stein: That's all.

Justice Breslin: All right. Step down, sir.

Mr. Kern: That's all, if the Court please. That's the defendant's case.

Mr. Stein: People rest, Your Honor.

Justice Breslin: And the defendant?

Mr. Kern: The defendant rests.

2019

Justice Breslin: We will hear motions now.

Mr. Kern: Now, if the Court please, I respectfully move to dismiss this information on three grounds:

First: That the prosecution has failed to prove beyond a reasonable doubt that, as charged in Counts 1 to 62 of the information, inclusive, the defendant sold, lent, gave away, distributed, showed, or offered to sell, or possessed with intent to sell, lend, give away, certain obscene, lewd, lacivious, filthy, indecent, sadistic, masochistic, and disgusting books, magazines, pamphlets, story paper, writing, or paper of an in-

decent character, under any titles listed in any one of the 62 counts of the information referred to.

I move to dismiss, further, on the ground that the prosecution has failed to prove beyond a reasonable doubt that the character of these books or writings come within the meaning of the description in Section 1141 of the Penal Law; that is, that any of those books were obscene, lewd, lacivious, filthy, indecent, sadistic, masochistic, or disgusting.

I further move to dismiss the information on the ground that Section 1141 of the Penal Law is unconstitutional in that it violates the First Amendment of the Constitution of the United States, which declares that Congress shall make no law abridging freedom of speech and freedom of the press, and that the said section is further in violation of the Fourteenth Amendment of the Constitution of the United States, which forbids the states of the Union to infringe upon the principle which is contained in the First Amendment to the Constitution of the United States; and

I further move to dismiss the information on the ground that the same violates the Constitution of the State of New York.

Now, if the Court please, may I direct the Court's attention to the fact—this is not for the purpose of any extended argument, but only for the purpose of illustrating the grounds for the motions to dismiss.

The prosecution charges in the various counts of this information that this defendant possessed the books and papers which are complained of. As a matter of fact, in the bill of particulars,

which is to be considered, of course, part of the information on file in this court—the bill of particulars furnished by the district attorney pursuant to the order of this court, dated August 31, 1960, the case of the prosecution rests—at least the counts from Number 1 to 62, inclusive —upon the claim that the defendant possessed with intent to sell, lend, give away, and show the articles referred to therein. And, furthermore, pursuant to the second paragraph of that bill of particulars, that at the time the articles referred to under Counts 1 through 62 were obtained by members of the Police Department. 2024 They were not in the immediate physical possession of the defendant.

Now, I respectfully submit—and this further is in support of motions which are made—that the evidence shows that police officers went to premises in a certain basement at Number 37 West 20th Street—24 West 20th Street, Borough of Manhattan, State of New York. At those premises there was a quantity of books; as a matter of fact, most of the books which are the subject of this information were seized at those 2025 premises. The evidence is beyond dispute that this defendant had no connection whatever with that basement. As a matter of fact, the point which I am making is rooted further in the fact that the prosecution has had, in support of the essential element of possession on the days mentioned in the information, the testimony of Norman Levenberg, who must be considered an accomplice in this case.

I don't believe the Court will disagree when I say that the facts may be proved in a court of law, and certainly in a criminal case, in

certain ways. There is direct evidence, and there is circumstantial evidence; and in these particular cases, being precise about the counts in the information, possession may be actual or it may be constructive. I don't believe that the prosecution will contend for one single moment that they have proven actual possession. As a matter of fact, the bill of particulars intimates that they are relying upon constructive possession.

Now, again I respectfully submit that the
2027 prosecution in this case is attempting to prove constructive possession by circumstantial evidence, because there is not a single iota of evidence in this case anywhere that this defendant at any time on any day mentioned in any one of these counts had physicial possession of these books and papers which are complained of.

Now, Your Honors, if this case—Well, I say just plainly and frankly that I have never seen a case where, as in this case, all of the evidence, or all the conclusions that the Court is asked to reach in this case, are the result of at least one inference based upon at least one other in-
2028 ference. I need not labor the rule of law with regard to circumstantial evidence. None of these books are items in evidence having been found in the immediate physical possession of this defendant, then the prosecution must be relegated to prove by circumstantial evidence.

And again I submit they cannot prove possession by the testimony of an accomplice unless that accomplice's testimony is corroborated; and there is no corroboration of Levenberg's testimony that on the 12th day of January, 1960, the books which were in the basement, which had been removed by him into the basement from Room 908, which

he, himself, had leased from the owner of the building, and books which he had removed from the basement, or from Room 908, to a storeroom out in the Bensonhurst section of Brooklyn, premises which were rented by him, which were paid for by him, with which this defendant never had any physical—any written connection, then that is not sufficient to establish possession in accordance with the claim in the bill of particulars on the part of this defendant. 2029

Now, the prosecution attempted to prove possession of books in a place of business known as Publishers Outlet and another place of business known as Midget Book Store. 2030

Now, I respectfully submit that the prosecution's proof has fallen far short of proving that this defendant owned or possessed or controlled any books—certainly the books in evidence here today—located in Publishers Outlet in the month of December, 1959, or in the Midget Book Store at another address in the month of January, 1960, sometime following the seizure of books at premises 37 West 20th Street.

Now, the prosecution tried valiantly of course, to prove that this defendant owned and controlled premises known as Publishers Outlet, Incorporated. Well, I don't think that we have to argue much about the method that the prosecution pursued in order to prove this essential fact. 2031

They offered witness to prove that this defendant on certain days stood in the front of the store and watched what was going on, that one clerk, or two clerks, in the premises called out to the defendant, consulted with him, that the defendant nodded about one thing or another. But apart from that, there's no proof of the de-

fendant's connection with Publishers Outlet; no proof of any kind.

I don't know what else the prosecution established in this case in order to prove the defendant's connection, but there is just one thing that comes to my mind now. And I remember the Court asking these questions based upon the receipt into evidence of an exhibit offered by the prosecution—a pay roll book. Now, the Court, I think, drew an inference—or, at least, Judge
2033 Galloway, in asking questions about the differential between the salary given to Mr. Revo, the alleged owner of the premises according to the prosecution's only witness, the accountant, who is familiar with all of the books—he said that the president of the Publishers Outlet is a man of the name of Revo—he was asked what connection this defendant has with Publishers Outlet, and the district attorney's own witness said he was a clerk employed there. Now, Judge Galloway, looking at the exhibit, asked the witness, "Isn't it a fact that this record shows that Mr. Revo, the president of this company, was earning $125
2034 a week—or $100 a week?"—I think it was $125—"and this defendant was earning $175 a week"? Therefore—and I don't believe Judge Galloway will disagree with this—the Court then was drawing an inference that because Revo, who was the reputed head and owner of this concern, was drawing $125 a week and the defendant was drawing $175 a week, he must be the owner. In other words, there is an inference based upon another inference.

Now, the inference that he is the owner based upon the inference that the man who got more

money is necessarily the most important figure in the place as far as ownership is concerned— 2035

Justice Galloway: That is a perfect *non sequitur.*

Mr. Kern: I don't know what it is.

Justice Galloway: I am telling you.

Mr. Kern: Of course, I am only outlining—

Justice Galloway: Why don't you look at the exhibit, the pay roll book?

Mr. Kern: No. I am only taking from the exhibit what Your Honor read as the basis of the question. And I am quite sure, Judge Galloway, this is the People's only witness. The People's witness said, "Revo was the president, Revo was the owner, and this man is an employee." That's what their witness said, and they are bound by it. They are bound by that. 2036

Now, the same thing goes—and here, Your Honors, is something which I can't understand at all, except that it shows the desperate effort that is made by the prosecution to establish a connection between this defendant and the books in Publishers Outlet and the books in the Midget Book Store. They offered in evidence a certificate of incorporation with all of the fanfare, all the rigmarole, about the legitimacy of signatures. Of course, that was conceded, because there is no point in not contending that it meant little but showing a lease made in the month of September, 1957, I believe. 2037

Mr. Stein: '58.

Justice Galloway: '58.

Mr. Kern: '58—'59—'58. And then, I suppose, the prosecution wanted to rest on that by having the witness testify that up to the month of January, 1960, he knew of no change in the

ownership situation of Midget Book Store, but, of course, Judge Gassman, very properly called attention to the fact that one who owned stock in a corporation doesn't have to make a record of his withdrawal from the corporation; all he has to do is transfer his stock and resign as an officer and director; and that is all there is to it. The district attorney was going to rest on that in order to show that having signed the lease in behalf of this corporation in September, 1958, it must necessarily follow that he
2039 was the owner of the Midget Book Store and in possession and in charge and control of books found in the Midget Book Store in the month of January, 1960, a year and a half later. But I think we need talk about that only to show the great effort made by the prosecution to hook the defendant up with possession, because testimony went into the record that not more than five months later the defendant withdrew from Midget Book Store—or Main Stem Book Store. I think that was the name of it. I know there has been so much in this case.

2040 Justice Gassman: Main Stem, 1607 Broadway.

Mr. Kern: Yes. That's correct. He withdrew and severed his connection with that organization, and that was the end of it.

Now, I feel very keenly, and I say very seriously, that the prosecution cannot depend for success in prosecution of this kind unless it proves that the defendant physically possessed the books and papers in evidence; or if he did not physically possess these exhibits, then that he had possession or constructive possession for the reason that he controlled the exhibits and it was for him to do what he wanted to do with

those exhibits at the time they were found and taken by the police.

The evidence is replete in this case that on the three days mentioned when police officers seized books and records from two book stores and a storeroom and a basement of 37 West 20th Street, this defendant was not in the premises, exercised no control. He was just not there. And again I respectfully submit that he who was actually in charge of those books, he who had control of those books on the day, is the only 2042
one who could have been prosecuted in this case.

Now, on the question of the corroboration of accomplice testimony, testimony of an accomplice that this man owned the books, that he controlled the books, that he possessed them for any purpose whatever, I respectfully submit there is no such evidence in the record. And all the Court has on that point is the testimony of Norman Levenberg, an accomplice. That, I respectfully submit, goes as well for the publishing counts—and I don't know how many there are—there are a great many publishing 2043
counts. The testimony came from Levenberg, the testimony came from writers, the testimony came from persons who typed manuscripts, all of whom entered into the manufacture and the preparation of these allegedly unlawful books.

Now, further than that—and this goes to the heart of the constitutional questions which have come before the United States Supreme court on so many occasions—and may this be considered in support of my motion to dismiss the information on the ground that the charges contained therein are violative of the Constitutions of the

United States and the State of New York—the United States Supreme Court only about 10 months ago, by a unanimous court, in the case of *Smith against California,* held that a statute similar to the New York statute in every detail with regard to the question of knowledge and scienter was unconstitutional. In that case a book seller was the defendant. The statute there had eliminated the requirement that the defendant know, or have knowledge that—that is, of
2045 the contents of the books which were in the store being offered for sale. The Court held that such a statute is unconstitutional for the reason that it imposes limitations, it imposes very serious restrictions upon not only the right to freedom of speech and freedom of the press, but the substantial right of freedom to disseminate the written word as well as the spoken word; and the court pointed out that a statute of this kind could impose a burden upon the owner of the shop who would say to himself that he had better not buy what might be considered a literary gem for the reason that
2046 sometimes somebody might say that that book was obscene or pornographic; and if every book owner or book seller had to read every volume that comes into his place of business for the purpose of resale, I daresay we would have no books sold from book shops anywhere in the country.

Now, in this case the district attorney stipulated at the beginning of the trial that the various counts in this indictment; that is, the counts charging possession for the purpose of sale, 1 to 62, the counts charging publishing, the counts charging hiring others to publish and

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prepare, and so on and so forth, were all rooted within the provisions or under the provisions of the first subdivision of Section 1141 of the Penal Law. I respectfully submit that that subdivision is unconstitutional.

I submit further that the appropriate provision of the General Business Law, Section 3—

Mr. Stein: 330.

Justice Gassman: 330 and 331.

Mr. Kern: —is unconstitutional for the same reason; for the reason that it imposes a restriction upon a substantial right, the right of freedom of speech and freedom of press guaranteed by the Constitutions of the State of New York and the United States.

2048

Justice Gassman: Well, in which respect is Sections 330 and 331 of the General Business Law claimed to be unconstitutional?

Mr. Kern: Because the section which has just been mentioned requires one who publishes to print the name and the address of the printer and the publisher.

Justice Gassman: That's right.

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Mr. Kern: Now, as Justice Black said in the United States Supreme Court in the case of *Smith against California,* he pointed out that notwithstanding that all of the other judges of the court agreed that the California statute involved in that case was unconstitutional for the single reason, among others not mentioned by Justice Black, that the essential requirement of scienter had not been eliminated from the statute, Justice Black went further—

Justice Gassman: Now, Mr. Kern—

Mr. Kern: Yes?

Justice Gassman: —what has Sections 330 and 331 of the General Business Law got to do with 1141 of the Penal Law? Section 330 provides that every publication—

Mr. Kern: Yes.

Justice Gassman: —printed or reprinted after September 1, 1956, and published in this state shall have conspicuously imprinted on the cover, title, or copyright page, or at the end of the publication, the true name and address of the publisher or printer.

Mr. Kern: Yes.

Justice Gassman: That has nothing to do with 1141.

Mr. Kern: I was just coming to—

Justice Gassman: It might apply to any book on spelling or any book on law.

Mr. Kern: Judge Gassman, I was just leading to what Your Honor was going—I was coming to that point.

Justice Gassman: Yes?

Mr. Kern: Now, Judge Black said any restriction, any limitation upon anything which is printed, as far as he was concerned, was an unconstitutional infringement upon the law. Now, when one is told by a law that you may, or may not, print this in the book, or you may, or may not, leave this out of your book, then I say there is an interference with freedom of press.

Justice Gassman: What is unreasonable about a requirement that anybody who publishes or prints a book should assume responsibility for the book by having his name and address printed on there?

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Mr. Kern: Yes. That's correct. I have no quarrel about that, but, Judge Gassman, I'm quite sure this Court has read the opinion of the Supreme Court of the United States not only in this case but in the case of *Roth against The United States.*

Justice Gassman: I am familiar with all of them. I have read them all.

Mr. Kern: Yes. Well, Your Honor will agree with me that when—

Justice Gassman: There is a lawyer sitting down here who had me read all those cases earlier this year—Mr. Holly. 2054

Mr. Kern: Yes. Well, the judges in this case seem to cling tenaciously to one thought, and that is this: That when you excuse the limitation or the restriction upon human rights by saying that, "When you open up the crack or open the door just a little bit in order to avoid serious consequences or in order to restrain the happening of something that might be considered serious, then you are within your rights, whether they are police power rights or not." However, Judge Black pointed out that we dare not open 2055 the crack even just a little bit. And who is there to say—who is there to say, Judge Gassman, how far the door should be opened or what is sufficiently important to justify the opening of a door, whether it be a half inch or a half a foot?

Justice Gassman: Well, didn't every one of the four opinions in the *Smith* case—didn't every one of those cases merely refer to a statute dealing with obscene or pornographic publications?

Mr. Kern: Yes. That's correct.

Justice Gassman: All right. Now, there they held, you know, and each one of the judges justified his opinion on a different point—as a matter of fact, Judge Frankfurter, who agreed with the majority, even went so far as to state that a book dealer or a book seller need not be compelled to read a book in order to know the contents. In other words, he might know what is in the book without even reading it.

Mr. Kern: That's Judge Frankfurter.

2057 Justice Gassman: That's Judge Frankfurter, yes. But I am trying to find out in which respect is the regulation of Section 330 or 331 of the General Business Law—how is it arbitrary? By virtue of what reason can you say that it is unconstitutional—asking a publisher to put his name and address on a book?

Mr. Kern: Well, Judge Gassman, you will forgive me if I say that I follow the reasoning of Judge Black. I think Judge Black has gone very far. That's true. I think he's departed very seriously from the opinions of the justices who wrote opinions in *Smith against California.* But

2058 I think that Judge Black, in writing his opinion, had an eye to what the Court said in so many cases, especially in the case of *Roth against The United States.* And Judge Black, as I said a few moments ago, went much further than any other judge by saying that any limitation upon the right of any man to write something or say something is an unconstitutional—is a violation of the constitution.

Justice Gassman: Would you say that the words "copyright, such-and-such a year, all rights reserved by the John Smith Publishing Company"—would you say that was an undue

and unnecessary restriction on the rights of the publisher?

Mr. Kern: No, no, not that.

Justice Gassman: Well, why?

Mr. Kern: Because that denotes—it denotes a license, a license to publish. It is not—It is nothing more or less than a man who is about to put up a building puts a sign out in front of the building "acting under building permit number so-and-so." This has nothing to do with the contents of the book, with authorship of the book. All it says is that the rights are reserved and protected by reason of the fact that there has been a certain document filed in the appropriate archives in Washington, D. C.; that's all that that says. And, as a matter of fact, there's no —I don't know. Well, of course, I haven't read the law on the subject, but I didn't believe that it was necessary to print anywhere in a book that a book had been copyrighted. I thought that publishers do that for their own protection so that their product might not be stolen by someone else.

Justice Gassman: All right. Now I have got your distinction between copyright and the other one, but I still am trying to follow—and, mind you, I haven't got my mind made up on it—I would like to find out, you know, why you claim Section 330 and 331 of the General Business Law is an unnecessary and undue restriction on the rights of publishers? I can't see what the objection should be to having a publisher put his name and address on there so that it might be known that he is the man who published that book.

Justice Breslin: Do you think a similar requirement which refers to newspapers is unreasonable and unconstitutional?

Mr. Kern: That the newspaper?

Justice Gassman: Disclose the names of the publishers? The names of officers, and so on, the name of the editor?

Mr. Kern: Yes, I think so.

Justice Breslin: You do?

Mr. Kern: I think so.

2063 Justice Breslin: Well, do you think there is anything in Judge Black's opinion on which you could predicate logically such an argument as you now state?

Mr. Kern: Well, Judge Black has written at great length on the subject. As a matter of fact, his entire opinion is dedicated to that particular argument; and if it holds true with regard to literature of the most obscene nature, and if what he says is so, that the door must not be opened even to the extent of a fraction of an inch, then it certainly should hold true with regard to any compulsion that a printer's name or

2064 an author's name be spread out on the record of a book.

Justice Gassman: I am sorry I interrupted your train of thought.

Mr. Kern: No.

Justice Gassman: I didn't mean to. I am merely trying to satisfy myself and to explore your thought on the matter.

Mr. Kern: I think, Judge Gassman, there was some opinion on the constitutionality. I think there was some case on that subject within the last few months, on the constitutionality of that requirement. I haven't had an opportunity to do any research on that.

Justice Gassman: Well, I wish you would help the Court—

Mr. Kern: Yes.

Justice Gassman: —in finding something.

Mr. Kern: Yes. I'm going to see if I can find that.

Justice Gassman: Yes.

Mr. Kern: And then, of course, I renew the motions made at the beginning of the trial.

There's just the one other thought in one of those motions, that these counts do not charge 2066
a crime for the reason, among others, that they do not allege that the defendant knew or committed this act knowingly.

Those are the defendant's motions.

Justice Gassman: And I assume that *People against Engel* is one of the cases that you intend to cite in support of it?

Mr. Kern: Yes.

Justice Gassman: New York Court of Appeals.

Mr. Kern: That's correct.

Mr. Stein: 7 New York 2nd, Your Honor.

Justice Gassman: What? 2067

Mr. Stein: 7 New York 2nd.

If I may be heard briefly?

Justice Breslin: Yes.

Mr. Stein: I don't want to dwell very much on the constitutional question. The constitutional question was decided in this case by Judge Dickens upon a motion to inspect the Grand Jury minutes in the case and to dismiss. Judge Dickens, in a short written opinion, stated that the case of *Smith against California* does not apply in the instant case. The only conclusion that one can draw from the opinion is that the

People have proven knowledge and that that is all that *Smith against California* requires. It doesn't require that the statute actually have the word "knowledge," but merely that the people prove knowledge. And I think, by implication, the case which Judge Gassman has just cited, *People against Engel,* says the same thing. It reverses a conviction on the ground that the prosecution did not prove knowledge; not that knowledge was not—

2069 Justice Gassman: Why, then, did the Court of Appeals in the *Engle* case cite the case of *Smith against California?*

Mr. Stein: Because, Your Honor, I think that when the court finally settles the constitutional question, *Smith against California,* will always be cited for the proposition that in a pornography case the prosecution must prove knowledge; not that the statute must include knowledge, but that the prosecution must prove it.

Justice Gassman: That isn't the strength of *Smith against California.* That decision doesn't go into the question of fact. It goes into the

2070 question of law, that a statute in California, which it is now contended is similar to our statute in that it does not provide for scienter or knowledge, is unconstitutional; and *People against Shapiro,* in the Appellate Division upheld, you know, that the People need not prove knowledge—

Mr. Stein: That's correct.

Justice Gassman: —under that statute.

Mr. Stein: That's right, Your Honor.

Justice Gassman: Now, I am just raising the question—and I think the Court is really sorry

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that the Court of Appeals in *People against Engel* didn't write more extensively on the subject.

Mr. Stein: Let me then briefly give you my views on this.

*Smith against California* was predicated upon an opinion of the highest court of the State of California. Mr. Justice Brennan's opinion even put it in italics, "The highest court of the State of California has ruled that the pornography statute involved does not require scienter." 2072
There has been no such ruling in this state. Taking that as a basis for its decision, the Court then said, "Therefore, the statute is unconstitutional." But the Court went on to point out reasons why this rule should hold. The Court stated that unless they so ruled, any book publisher would be unwilling to buy books, and so forth. They went into the fact that in the particular book store involved in the case there were a host of books which this book seller could not have read. There was a factual situation involved, and the fact that the prosecution did not prove scienter was very notably stated in 2073
that case.

The Court said that if a statute does not require scienter, it is unconstitutional. The Court, therefore, also has to mean that even if a statute requires scienter and you don't prove it, you are out the window. And that is why the Court in *People against Engel* cited the *Smith* case, because the prosecution had not proved scienter; and, certainly, under the *Smith* case you have got to prove scienter.

Now, finally, as far as the constitutional question is concerned, again I feel that the decisions

which have already been written on the subject, one by Judge Dickens, one by Judge Saypol, the case of *People against Engels,* which, by implication, says, "As long as you prove scienter, that's enough,"—I think that these are sufficient, Your Honors, to uphold the constitutionality of this statute.

Now, as to the rest of the case I submit this is a very simple case. There are only two questions. Is Mr. Mishkin a publisher of these
2075 books, and, incidentally, did he possess them with the intent to sell? And, secondly, if so, are the books pornographic?

Now, there have been a lot of witnesses who have testified here. They all say, "Mr. Mishkin told me to write," "Mr. Mishkin told me to print." I think that there can't be any question but that Mr. Mishkin did these things, and that at his request a whole process of production was set up, the outgrowth of which is here in the court in People's Exhibits 1 through 72.

Now, the point which Mr. Kern makes much of, and concerning which he cites the despair
2076 and desperate nature of prosecution, is that we are lacking in corroboration. Now, I submit, Your Honors, that if I had the kind of corroboration in other cases involving accomplices that is present in this case, the prosecution wouldn't have anything to worry about.

Mr. Kern has forgotten certain elements of proof which have been brought into the case, which I should just like to very quickly refresh the Court on.

Mr. Levenberg testified that he maintained for the defendant a certain warehouse at 37 West 20th Street, Room 908; at the defendant's re-

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quest he removed books from 908 to an establishment known as the Publishers Outlet Store. What does the prosecution show to prove that this is so and that Mr. Mishkin is inextricably linked up with the books found in the warehouse and in Publishers Outlet Store? Nothing. Nothing, other than three slips in Mr. Mishkin's handwriting listing at least twenty or more of the books found in the warehouse and brought to Publishers Outlet. And before each of these books is a number, for example, "100-Catanis", 2078
"all of the blacks", and so forth. What better proof could there be tending to connect this defendant with the books in the warehouse and with the books in the Publishers Outlet Store? And, of course, Your Honors, that's all we need. We need merely to tend to connect this defendant with the crimes involved.

Now, as far as the ownership of the Publishers Outlet Store is concerned, I don't have to prove that Mr. Mishkin is the owner of the Publishers Outlet Store, although there was such testimony here. All I have to do is tend to connect him with the crimes involved; and I think we have 2079
more than tended to connect him, by corroboration, with the Publishers Outlet Store through the three slips; through five purchase invoices which were here in evidence bearing in the defendant's handwriting "O.K.", and a check mark after that; through a monthly statement which is here in evidence, with the words "O.K. Ed" and a check mark after them which were found at the Publishers Outlet Store at the time of the arrest. Well, why does the defendant okay invoices at the Publishers Outlet Store if he is not even connected with the store?

Is there anything else that tends to connect the defendant with the store? There is the testimony of Mr. Dryer, who stated that he went into the store, and on approximately four occasions saw the defendant there. When all the other clerks spoke to one another they spoke loudly; when they spoke to the defendant they whispered. That's some evidence, but that's not all that we have. We have the three slips. We have those purchase invoices.

Now, the accountant, our witness, as Mr. Kern states, who was also, coincidentally, accountant for the defendant, and who spoke to the defendant some two days after he received a subpoena —our witness testified that the defendant is merely an employee. Well, I don't care if we tend to show that he owns the store. All I care about is whether we tend to connect him with the store; and I submit that we have. The pay roll book shows this. His own accountant states he is an employee. The book shows he gets two hundred dollars a week; no one else gets two hundred dollars a week, not even Mr. Harry Revo, who is the so-called president of that store.

Now, do we have any other evidence that tends to connect the defendant with the crimes involved, with the books of the Publishers Outlet Store? Anything else? Marilyn Barasch, she's not an accomplice. She never read these books. She hardly ever spoke to Mr. Mishkin. She was the bookkeeper for the Book Sales Corporation. She testified that in the regular course of business she sent out certain documents. Two of these were debit memos. The debit memos indicate that she was sending back books which the

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Book Sales Corporation had previously purchased from the defendant. What were these books? "Eyewitness". "Catanis". "Temptation". "Fury". "Betrayal". "Masque". "I'll Try Anything Twice". And "French Girls on the Stairs". All books published by Mr. Mishkin, according to prior testimony and part of the information. Certainly this is corroboration. Certainly we tend to connect the defendant with these books through that testimony.

Now, there were two artists who testified. I 2084
believe that it is a question for the Court to determine as a question of fact, whether these artists are accomplices or not. I acknowledge that there is a question of fact, but I say that the Court, for itself, can determine whether under all the evidence, these witnesses are accomplices. There is evidence that they are presently employed for certain corporations which produce books similar to those in evidence. Yet, at the time they made these drawings, they had not, for the most part, read these books.

Another People's witness offering corroboration is Mr. Vaccarella. He is not an accomplice. 2085
He purchased certain books from Mr. Mishkin for resale. The cases are very clear in the field of narcotics, directly analogous to the instant situation, that a purchaser of narcotics is not an accomplice unless he makes a purchase pursuant to a conspiracy with the man who sells it to him to then go out and sell to other persons. There was no such conspiracy here. There was no such agreement between Mr. Mishkin and Mr. Vaccarella. Mr. Vaccarella bought certain books for himself, and then he sold them to another person. And the case of *People*

*against Dasher,* 65, 2d, 684, and *People against Cabackrella,* 228 App. Div. 405, affirmed without opinion in the Court of Appeals, 306 New York 759, bear this out.

Another piece of corroboration is the contract which Mr. Mishkin signed and which Mr. Rosholenko signed, for the book "The French Girl on the Stairs, Parts 1 and 2".

Another piece of corroboration is Mr. Mishkin's presence in the Midget Book Store at the
2087 time that store was raided on December 29th. He came to the door, spoke to someone, and then left immediately when the police were there.

As far as the corroboration concerning the Main Stem Book Store is concerned, it is for the Court to determine whether that is enough. I submit we have tended to connect this defendant with the store, which is all we need do, through the fact that he is an officer of the store and signed certain documents. But in addition to that, I submit that there is further corroboration as to the three books found in that store.
2088 First, through the three artists, and, in addition, through one particular piece of evidence which I now ask the Court to consider for just a moment. Defendant's Exhibit A, introduced into evidence by Mr. Kern, is a little thesis or treatise written by one Mr. Justin Kent. Mr. Kern said, "Did you write this, Mr. Kent?" "Yes." "Did you write this for Mr. Mishkin?" "Yes, I did." "Isn't it a fact, sir, that you wrote this for Mr. Mishkin to show Mr. Mishkin that all of the books you wrote for him were not pornographic?" I ask Your Honors to consider whether those questions, coupled with that little

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treatise which Mr. Kern introduced in evidence, does not tend to connect Mr. Mishkin with all of the books written by Mr. Justin Kent?

As to whether or not the books are pornographic, Your Honors, the books are here in evidence. The Court has either read them or will read them, and I leave it for yourselves to judge as to whether or not they are pornographic.

Mr. Kern cites Judge Black's views on the First Amendment. These are well known. And with great deference and respect for Justice Black, it would seem that his views are singular on this. He says not merely, "Don't open the door a crack," but, "Don't open the door at all." The rest of the Court says that in certain cases the police powers of the state permit the proscribing of persons from disseminating filthy, dirty, lewd, and lacivious material. And I submit that upon a reading of these books the Court will find them to be so.

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That's all I have to say.

Justice Breslin: Should you care to submit any memorandum in support of your motions, why, you are at liberty to do so, because we are going to continue this trial now. Adjourned until next Monday. I will tell you why. Over the past weekend each one of us has spent considerable time going over these many exhibits. We still have a great many to read. I am referring now to the books in question. It will involve quite a bit of time, so I think if we adjourn until Monday it will give us ample time to look into the authorities and also to complete our examination of all the evidence in the case. Monday morning, eleven o'clock.

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Mr. Kern: May I just take this occasion to express my thanks to the Court. The Court has been very patient in this case.

Justice Breslin: I think, too, it is an appropriate time for the Court—and I am sure my colleagues will join me—to pay compliment to you, Mr. Kern, and to you, Mr. Stein, for the way you have conducted yourselves. You have shown yourselves to be excellent lawyers and gentlemen, and you are both a credit to the bar for the way you have conducted yourselves.

Mr. Kern: Thank you very much, Your Honor.

Mr. Stein: Thank you, Your Honor.

(This is to certify that the foregoing is a true and correct transcript of the within proceeding as recorded by me.)

PAUL H. PETERSON
Official Court Reporter

**Minutes, November 16, 1960.** 2095

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK—PART III,

NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

*against*

EDWARD MISHKIN,

*Defendant.* 2096

100 Centre Street,
New York 13, N. Y.
November 16, 1960.

Calendar No. 1; Information No. 5014/60.

Vio. §1141 Penal Law.

Trial Continued

Court Officer: Number 1; (Calendar No. 1)— 2097
Edward Mishkin.

(All parties present.)—

Justice Breslin: You have made your motions?

Mr. Kern: Yes, the motions have been made.

Justice Breslin: The motions made by the defendant at the conclusion of the trial are, in all respects, denied, except as hereinafter indicated. The motion is denied with respect to Counts 1 to 32 inclusive; 37 to 53 inclusive; 57 to 61 inclusive; 63 to 65 inclusive; 67 to 87 inclusive; 89 to 93 inclusive; 95 to 99 inclusive; 101 to 104

inclusive; 106 to 113 inclusive; 115 to 135 inclusive; 137 to 141 inclusive; 144 to 148 inclusive; 150 to 153 inclusive; 155 to 162 inclusive; 164 to 175 inclusive; 177 to 182 inclusive; 185 to 190 inclusive; 192, 193, and 196 to 198 inclusive—the defendant is found guilty on each of the above counts.

Defendant's motion is granted with respect to Counts 66, 88, 100, 114, 136, 142, 149, 163, 176, 183, 184, and 194, and the defendant is acquitted on each of those counts.

2099 We have a written decision and opinion which we are filing with the papers, which will be made part of the record, and the original I'll give to the stenographer to copy into the record, it is to be filed with the papers in this case and made a part of our decision.

Justice Gassman: And a copy given to the District Attorney.

Justice Breslin: Now, how much bail is this defendant on?

Mr. Kern: Well, it is twenty-five thousand ($25,000) dollars, and that, I think, is sufficient.

2100 Justice Breslin: We're going to order an investigation in this case. Will you have somebody in the Probation Department get in touch with me? We want an investigation by December 9th. Investigation and Sentence, December 9th. Bail will be continued.

Mr. Kern: Will Your Honor make that the week following the 9th?

Justice Breslin: How about the middle of the week, December 14th?

Mr. Kern: Yes.

Justice Breslin: Make it December 14th; investigation and sentence.

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Mr. Kern: And, bail continued?
Justice Breslin: Bail is continued.

(This is to certify that the foregoing is a true and correct transcript of the within proceedings as reported by me on November 16, 1960.)

DAVID D. GEDDES, C. S. R.,
Official Court Reporter.

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2104 **Minutes of Sentence.**

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK—PART III,

NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK

*against*

EDWARD MISHKIN,

2105 *Defendant.*

[Calendar No. 2; Information No. 5014/60.]

Vio. §1141 Penal Law.

Sentence imposed at:
100 Centre Street,
New York 13, N. Y.,
December 14, 1960.

Before:

2106 Hon. Benjamin Gassman, Justice Presiding;
Hon. Edward F. Breslin,
Hon. Edward T. Galloway, Associate Justices.

Appearances:

For the People: Melvin Stein, Esq., Assistant District Attorney, New York County.

For the Defendant: Michael Kern, Esq., 37 Wall Street, New York 5, N. Y.

Court Officer: Number 2; (Calendar No. 2)—Edward Mishkin.

(Defendant and Counsel present.)—

Mr. Kern: Good morning, Your Honors.

Justice Galloway: Good morning.

Justice Gassman: Edward Mishkin, are you ready for sentence?

Mr. Kern: Well, may I, in connection with that question put to the defendant, may I at this time move an arrest of judgment, on the ground that, without repeating the motions which were 2108
made prior to the trial, on the ground that the information before the Court upon which the defendant was tried, does not state a cause of action under any lawful or constitutional provision of the Penal Law or of the Code of Criminal Procedure; on the ground that the defendant, accordingly, is not charged with any crime.

Justice Gassman: Motion denied.

Mr. Kern: Respectfully except.

Justice Gassman: Are you now ready for sentence?—Any legal cause why judgment should not be pronounced?

Mr. Kern: Now— 2109

Justice Gassman: Just the question of the legality—is there any legal cause?

Mr. Kern: Yes.

Justice Gassman: —I will give you a chance to speak later on.

Mr. Kern: Yes; well, there is no legal cause, no.

Justice Gassman: All right. This defendant was convicted after a trial on 172 counts of a 198-count information. The 172 counts are divided into four categories.

Category Number 1 covers Counts 1 to 32 inclusive; 37 to 53 inclusive; and 57 to 61 inclusive, a total of 54 counts, which charged the defendant with possession of obscene books and printed matter with intent to sell. These are all under subdivision 1 of §1141 of the Penal Law.

The second category covers Counts 63 to 65 inclusive; 67 to 87 inclusive; 89 to 93 inclusive; 95 to 99 inclusive; 101 to 104 inclusive; and 106 to 110 inclusive, a total of 43 counts, which
2111 charges the defendant with manufacturing and preparing the obscene books described in those counts, and this category is also covered by subdivision 1 of §1141 of the Penal Law.

The third category covers Counts 111 to 113 inclusive; 115 to 135 inclusive; 137 to 141 inclusive; 144 to 148 inclusive; and 155 to 159 inclusive, a total of 43 counts, which charges the defendant with employing other persons to assist him in the preparation and sale of the obscene books and matter described in those counts, and this is covered by subdivision 2 of §1141 of the Penal Law.

2112 The fourth category covers Counts 160 to 162 inclusive; 164 to 175 inclusive; 177 to 182 inclusive; 185 to 190 inclusive; and 192, 193, 196, 197, 198, a total of 32 counts, which charge the defendant with the violation of §§330 and 331 of the General Business Law.

We have a full Probation Report here which indicates that in 1952, on February 29th, this defendant was convicted of a violation of §1141 of the Penal Law, and at that time he was fined sixteen hundred ($1,600) dollars, and in addition thereto he received two 6-month suspended sentences, two 3-month suspended sentences, and one 30-day suspended sentence.

Now, with respect to the 54 counts charging possession of obscene books, the testimony discloses that those books were found in two locations controlled by the defendant. On January 12th, 1960, in the basement of 37 West 20th Street in New York City, the books which were marked People's Exhibits 1 to 42 inclusive were found; and on December 29th, 1959, at the Publisher's Outlet, 254 West 42nd Street, New York City, a quantity of books were found which were admitted in evidence as People's Exhibits 2114
48 to 67 inclusive.

The record of the defendant indicates that in 1936 he was convicted of bookmaking, and got a 30-day suspended sentence, then a second sentence on the same day of 30 days suspended on bookmaking. March 18, 1950 he was charged with indecent articles. He was discharged, 1951, indecent pictures, discharged. December, 1951, indecent pictures, discharged. And in June of 1952 he was charged with indecent pictures and the case was D. O. R'd. December, 1959 he was charged with vagrancy, and that charge was dismissed. 2115

Now, we will hear you.

Mr. Kern: Now, Judge Gassman, the Court will understand, I think, how difficult it is to address one's self to the Court in a case such as this, especially in view of the fact that the trial of this case lasted one full week, and it is to be assumed from the fact that it took so long to try this case that the Court is fully cognizant with everything that is to be said about the case, especially in view of the added fact that the Court has a full and thorough report from the Probation Department before it;

but there are some things it is felt which may be of importance that have not been presented to the Court, but of necessity Counsel must talk about those points, which the Court should consider, I think, before or in considering or thinking of the sentence to be imposed.

This, of course, is not a crime of violence; it is a situation which is described in §1141 of the Penal Law, and it is one which I have strong beliefs about, and I have expressed those beliefs to the Court in the form of motions prior to the
2117 trial, which motions were denied.

I don't doubt that this Court is thinking in terms of deterrents and rehabilitation, and in connection with a sentence imposed by any court for the purpose of deterring, or rehabilitation, or for the purpose of seeking the rehabilitation of one who has been convicted of a crime, I think it is important for the Court to know certain things about the background of the defendant, and, in connection with that, may I say as a result of the conversation with Mr. Stein this morning, when Mr. Stein expressed himself,
2118 as he has a right to, saying that he has no sympathy with this kind of a case, I made the observation that while patriotism is generally the last refuge of the scoundrel, notwithstanding that it is necessary, I think, as an offset to what one might feel naturally about the commission of this type of crime, to note these facts, among others; first, that the defendant is a man who has served his country, and served it well. I want to tell the Court I never resort to this, but I think it is important that the Court have it. This defendant served in the European Theatre of War during the 2nd World War, and received

five Battle Citations. Now I think, if the Court please, that this would indicate a man who is not morally crass or bankrupt, I think it indicates a type of a character and mentality that holds above personal safety the thought of service. Now, the Court might well say, what type service was rendered in this type of act which the Court by its conviction of the defendant condemned? Well, I say this, if the Court please, is not the kind of a crime or an act which results from something which is carefully and deliberately planned in order to hurt some individual. Now, the Court will note that I don't say he committed any injury to society itself. My views are, and this is the views of some of the Justices of the United States Supreme Court, the public isn't hurt by this kind of a case in the same sense as it hurt in any other criminal case.

This man, if the Court please, who is married and has three children, who has been a good provider and a good family man, and a good and a regular attendant at religious services, true, according to the sentence of this Court or the judgment pronounced, I should say, at the conclusion of the trial, committed a crime or an act which is condemned by the law. However, and I ask the Court most respectfully to note this, in the publication of these books and these pamphlets and these photographs, this I know is echoing the sentiments, I think, of Justice Black as well as Justice Frankfurter of the United States Supreme Court in cases of this type, no one is imposed upon to the extent that there is a must about the purchase or the reading of this

printed matter—one has a right to go into a book store and buy anything he wants to buy. Justice Black said one should have a right, or has a right, in his opinion, to print anything he wants to print without any restraint and without any limitations.

Now, if the Legislature is interested in seeing that these books or these papers should not fall into the hands of minors, there are types of legislation which can be enacted similar to the
2123 type of legislation which places a restriction upon the right of a bartender or the owner of a bar & grill in which thousands of dollars have been invested to see that a minor does not come in to purchase liquor for consumption on the premises or any other place. Now, it is unfortunate that there is not that type of legislation. However, at one time in one and the same breath, they say that one has a right to have a place of business and sell books or printed matter, in the language of the court in *Smith v. California,* where the owner of the store or the salesman has no knowledge of the contents of
2124 the book, and at the same time to hold that the act of the defendant in connection with what has been established here is unlawful, I cannot see that at all. However, no one is compelled to enter this place to buy these books or papers. Anyone walking in there buying it does so for his own amusement, or for his own edification or his own education. He has not improvised or thought deliberately of this method of committing an affront to the People of the State of New York. This, if the Court please, has been a practice that goes back so long as we say in the law that "the memory of man run-

neth not to the contrary." These questions have come before courts of law centuries ago. This defendant, as other booksellers and other book manufacturers, has followed a practice of printing books and selling books. He has followed a pattern which has been established and which is still in usage not only in the City and State of New York, but throughout the whole country. These very books with which the Court was concerned during the trial of the case have been distributed throughout the country as a result of preparation by others, not this defendant, and are still being sold in most of the States of the Union without any hindrance, without any limitation or restriction. 2125 2126

Now I say this, of course the Court should understand, only in connection with mitigation, in connection with my—as part of my request at this time for the Court to be as lenient as it possibly can with the defendant. Certainly if the imposition of the sentence is to act as a deterrent, whatever sentence imposed by this Court will be a sufficient deterrent, I am sure, for this reason, and this also might be considered in connection with rehabilitation: When this case began with the arrest of the defendant, I think I spoke with Mr. Stein, and I told him what then was in the mind of the defendant—the defendant had planned to leave the jurisdiction of the State of New York. He owns his own home, maintains his family, he was going to sell his home and take his family out west to start anew. Questioning the defendant during last week on that subject, I was informed that the house has been up for sale, and that it is now simply a matter of formality, a matter of simply submit- 2127

ting and signing a contract, so that, of course, the State of New York or the authorities here won't be troubled by any repetition on the part of the defendant. But, again referring to the rejoinder of my friend, Mr. Stein, who the Court will agree is a most able prosecutor and presented all of the facts in this case, he said, "Well, it is not our purpose to saddle the defendant upon the authorities of the State of California, or any other place." That is so,
2129 there is no question about that, but I am quite sure from what this defendant has told me, there is nothing in his mind about continuation of this type of activity.

The reason the defendant had been thinking and is thinking now about removing himself from the State of New York is so that he might be given an opportunity to start fresh in some activity or endeavor which certainly would not be characterized by any enforcement or prosecuting agency in violation of any criminal statute.

I most respectfully bespeak for the defendant the hope that the Court will temper justice with
2130 mercy, will be lenient with the defendant, and in order to support that statement, respectfully submit to the Court these facts which I have mentioned as to the defendant's family background, his family life, his devotion to duty while in the Armed Forces or the Armed Services of his country, and last but not least in importance in my mind, the thought that the defendant only followed a pattern, and has done, in connection with this activity, what has been done for so long before him and so often before him, and in fact is being done now throughout the country.

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Justice Gassman: Mr. Stein, do you want to be heard?

Mr. Stein: Yes, Your Honor, I would like to. If it please the Court, Mr. Kern; Mr. Kern has stated, for one thing, that the defendant desires to start afresh, he wants to leave the jurisdiction, go to California and give up the business he has been in—this immediately following the statement that the defendant feels that he has merely followed a practice that has been set up, and that he has done no real wrong. If he has done no real wrong, the sudden desire to go to California can be due only to one thing—that he feels that immediately impending is a sentence which can send him away for some time.

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The Court is asked now to stay that sentence, just as in the past arrests of the defendant have resulted in either discharges or suspended sentences. So that we may rely on the word of the defendant as to what his future activities are to be.

In determining who this man is, and what type of sentence the Court should impose, I think that there is nothing that speaks more eloquently of what the defendant has done and the type of man he is than the trial itself. The very nature of the evidence, I think, clearly indicated to this Court and any observers who this man was.

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Edward Mishkin is the man who hired the artists to draw his pictures; he is the man who hired the authors to write the books; he is the man who hired the printers to print these books and have them bound and delivered. And the books Your Honors have read, I need not dwell on their contents; they deal with the most vicious type of physical abuse in which human dignity

is completely besmirched, all morality is done away with. This is the type material which this defendant has indulged himself in for quite some time now. The defendant's activities in the pornography business are not something immediate, they are not something that just started a short time ago, they go back quite a bit. He has been repeatedly arrested for possession of pornographic materials from 1950 down to this year. He has been convicted only once—that was in 1952. In 1955, this defendant went to
2135 Washington to testify under subpoena at the Kefauver Committee, at that time investigating juvenile delinquency; the Committee at that time was specifically looking into the effect of pornographic materials on juvenile delinquency.

Incidentally, I might note, Mr. Kern has stated no one is forced to buy this material—what harm does this material do? And yet an entire Congressional investigation was devoted to the interrelationship of this material and the extremely urgent problem of juvenile delinquency. This defendant went down to Washington. He
2136 was called upon to testify. He took the Fifth Amendment as to each and every question he was asked. He journeyed back to New York, returning to the Times Square area where he is a well-known figure, his reputation as a sort of untouchable being enhanced in the Times Square area.

Our investigation clearly showed that Mr. Mishkin is the controlling factor in all of the book stores that purvey all types of pornography. We know, for example, Your Honors, that the defendant immediately subsequent to his arrest, and subsequent to several other ar-

rests, we know this on the most reliable of information, called a meeting of all of the dealers, the book dealers in the Times Square area, to determine what could be done to combat the new campaign that the District Attorney's Office and the Police had lauched into the pornography area. Now I ask the Court whether this is the activities of a man who sincerely repents the type of activity he has been engaging in, or whether this is the act of a man who is going to stay in this business and get as much 2138
out of it as long as he can.

I would just want to, very briefly, read to the Court an excerpt of the 1956 Kefauver Committee report, a page and a half of which deals with the defendant Edward Miskin—this is an interim report of the Subcommittee to Investigate Juvenile Delinquency to the Committee of the Judiciary.

Justice Gassman: We have all that in the Probation Report, Mr. Stein.

Mr. Stein: All right, you have that. Mr. Kern stated, apparently somewhat reluctantly, that patriotism was something he should not resort 2139
to. I disagree with him; I think there are things we have heard about the defendant, the fact he has served in the Armed Forces, and apparently with some distinction, is certainly in his favor. To my mind, it is the only decent thing I know this man has done. Since the time he has served in the Army, what has he done to project an image of himself as a patriot? All the recent activities of this man are reflected in the trial record of this case. If that is the measure of what an American patriot is like, you see a man who immediately after coming

out of the Army is arrested six times for the possession of pornographic materials; it is not a man who gives up once convicted—no, sir. He knows what he is doing is wrong; and yet it is a man who continues, until finally he sees the enormity of the case prosecuted against him, and thinks perhaps the time has come for him to leave these activities.

The defendant has also stated through Mr. Kern and another attorney who saw me, that his desire is to leave to a particular city in
2141 California, the City of Los Angeles. Next to New York, I think there is no city in this country which has a greater pornography problem than the City of Los Angeles. I respectfully ask this Court not to make it any more easy for this defendant to find his way down to that city.

At the present time, Your Honors, the District Attorney's Office of this County as well as the other counties in the city, in a coordinated effort with the Corporation Counsel and with the cooperation of the Mayor, have embarked on a long campaign to rid our city of what we regard
2142 as an almost dirty growth growing up in its midst, something that we must excise. Mr. Kern has stated that this city has been beset by a pornography problem for some time, and that the defendant was merely following a set pattern. Mr. Mishkin has not only followed the pattern, but he has enlarged on it and revised it a great deal, and any of the earlier literature that deals with flagellation, sadism, and brutality, I think is perhaps overshadowed by the kind of works that this man turned out.

I think, Your Honors, that in order for the problem of the spread of pornographic litera-

ture, particularly the sadistic and masochistic type to be finally dealt with firmly, would be to lay hands on this cancerous type growth which besets our city and remove it once and for all. We have got to deal strongly with those persons who are at the very top of this business. It is not often we get one of them. Finally we do have one of them, Mr. Mishkin, the publisher of at least 50-odd titles of pornographic books, before this Court. I think if we permit this defendant to walk lightly out of this Court with a 2144
suspended sentence or any sort of a light sentence, I think it would only be to encourage those purveyors of this type of literature who make their way in the Times Square area.

I ask this Court, Your Honor, to impose upon this defendant nothing less than a very substantial jail sentence.

Mr. Kern: May I just point out to the Court that the District Attorney is in error in his statement that the defendant testified before any Senate Subcommittee in Washington, or any other place. This defendant never testified in Washington. 2145

Justice Gassman: Was he subpoenaed before the Kefauver Committee?

Mr. Kern: He was subpoenaed, yes, but there was an appearance here in New York County; there was no testimony given, nor was there any testimony given in Washington. As to the statement that this defendant spearheaded a drive or a plan of some concerted action on the part of people in the similar type of business to do something to oppose the wishes of the Office of the District Attorney, well, I don't believe that that is founded on anything stronger or

more substantial than what the District Attorney said about his appearance in Washington.

Mr. Stein: Well, just as to the appearance in Washington, Your Honor, the facts in the matter I believe are correct, that the defendant was called upon to testify, and took the Fifth Amendment. I have in my hands a letter from James A. Fitzpatrick, Counsel to the—

Justice Galloway: Mr. Stein, may I interrupt?

Mr. Stein: Yes.

2147 Justice Galloway: I think Mr. Mishkin's contention is that a hearing was held in the District Federal Court House over here in Foley Square.

Mr. Stein: In New York rather than Washington?

Mr. Kern: Yes. He did not testify.

Mr. Stein: He refused to testify.

Mr. Kern: He did not testify, Mr. Stein.

Justice Galloway: All right.

Justice Gassman: Mr. Kern, this Court has taken the trouble during the course of the trial and for weeks thereafter to read every one of the 50-odd books that were marked in evidence.

2148 I needn't tell you every member of this Bench was sickened when we started to read the books, the law requiring us to read them, and we read them, but we would have preferred a much more wholesome job than merely reading the books.

We find the situation in these days in almost every community plagued with the question of juvenile delinquency, the youths, the adolescents, and even a great many adults are unsettled in their minds because of the present hydrogen and atomic age—they don't know what the future holds in store for them, and the availability of books of this type to these teenagers, to the

adolescents, and even to the mature people is no assistance to them in the settling of their unsettled minds.

Now, before we go on with the sentence: Mr. Mishkin, is there any question about the fact that on February 29th, 1952 you were convicted in this Court and were fined sixteen hundred ($1600) dollars, and received the five suspended sentences that I referred to before?

Mr. Kern: No question about that, he says.

Justice Gassman: Now, it is the position of 2150
this Court to treat the possession features of the case, which involved some 54 counts, for the purpose of sentence, as two punishable offenses; one is the possession of the books in the basement of 37 West 20th Street, and the other is the possession of the books at the Publisher's Outlet on West 42nd Street. Under the provisions of §1141 of the Penal Law, the defendant, as a second offender, is liable to a sentence of not less than thirty (30) days or more than one year in prison, or to a fine of not less than two hundred and fifty ($250) dollars or more than three thousand ($3,000) dollars on each count of 2151
the offense. We shall, therefore, treat the possession as two offenses to which the defendant is subject to punishment.

The 43 counts involving the manufacturing and preparing of the books will likewise be treated as one punishable offense, to which the defendant is subject to be punished as a second offender.

We shall treat the 43 counts of hiring and employing others to assist him in the preparation of those books as a punishable offense to which the defendant is liable to be punished as a second offender.

2152 *Minutes of Sentence*

With respect to the 32 counts involving violation of the General Business Law for failure to publish or print the name of the publisher or printer, under the law the defendant is liable to a penalty of not less than one hundred ($100) dollars or more than five hundred ($500) dollars for each offense.

Accordingly, it is the judgment of this Court that the defendant be sentenced as follows:

2153 In connection with the possession on West 20th Street, on Count 1, the defendant is fined the sum of three thousand ($3,000) dollars, or one year in the New York City Penitentiary, and, in addition thereto, the defendant is sentenced to one year in the New York City Penitentiary on this count.

On Count 48, involving possession of the Publisher's Outlet on West 42nd Street, the defendant is fined the sum of three thousand ($3,000) dollars, or one year in the New York City Penitentiary, and, in addition thereto, he is sentenced to one year in the New York City Penitentiary.

2154 Sentence will be suspended on Counts 2 to 32 inclusive; Counts 37 to 41 inclusive; Counts 41 to 47 inclusive; Counts 49 to 53 inclusive; and Counts 57 to 61 inclusive.

On Count 65, which involves the manufacturing and preparing of those books, the defendant is fined the sum of three thousand ($3,000) dollars, or one year in the New York City Penitentiary, and, in addition thereto, the defendant is sentenced to one year in the New York City Penitentiary.

Sentence will be suspended on Counts 63, 64, 67 to 87 inclusive, 89 to 93 inclusive, 95 to 99 inclusive, 101 to 104 inclusive, and 106 to 110 inclusive.

Each of the above three sentences is to run consecutively.

On Count 111, which involves the employing and hiring of others, the defendant is fined the sum of three thousand ($3,000) dollars, or one year in the New York City Penitentiary, and, in addition thereto, he is sentenced to one year in 2156
the New York City Penitentiary, the last-mentioned prison sentence to run concurrently with the prison sentence imposed on Count 65.

Sentence is suspended on Counts 112, 113, 115 to 135 inclusive, 137 to 141 inclusive, 144 to 148 inclusive, 150 to 153 inclusive, and 155 to 159 inclusive.

On Count 160, which involves a violation of the General Business Law, the defendant is fined the sum of five hundred ($500) dollars.

Sentence is suspended on Counts 161, 162, 164 to 175 inclusive, 177 to 182 inclusive, 185 to 190 inclusive, and 192, 193, 196, 197, and 198. 2157

Mr. Kern: I take it there are three consecutive 1-year sentences?

Justice Gassman: There are three consecutive 1-year sentences, and a total of fines of twelve thousand, five hundred ($12,500) dollars.

(THIS IS TO CERTIFY that the foregoing is a true and correct transcript of the within proceedings of sentence as reported by me.)

DAVID D. GEDDES, C. S. R.,
Official Court Reporter.

2158 **Opinion.**

BENJAMIN GASSMAN, J.

On December 29, 1959, police officers confiscated a number of books, alleged to be obscene, from a book store at 254 West 42nd Street, New York, known as Publishers' Outlet. Those books were all identified and were later admitted in evidence. On January 12, 1960, police officers, armed with a search warrant, raided a basement in premises 37 West 20th Street, New York, and confiscated a number of books, alleged to
2159 be obscene, which books were identified and later admitted in evidence. According to the testimony of one Norman Levenberg, who had a printing shop at 37 West 20th Street, those books were the property of the defendant. He testified that he printed those books at the request of the defendant; that the defendant instructed him to deliver some of those books to Publishers' Outlet, some to another store designated by the defendant, and the balance stored in Room 908 of the said building. He testified further that the defendant gave him each month the money to cover the rental of that room;
2160 that in November, 1959, defendant told him that Room 908 was under police surveillance and instructed him to move the books from that room, and that he thereupon made an arrangement with the superintendent of 37 West 20th Street for permission to use the basement for the storage of those books. He stated further that he removed the books from 908 to the basement, where they were found and seized by the police. According to Levenberg, he paid about $600 to

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the superintendent for the use of that basement and that the defendant gave him about $200 of that amount.

On February 10, 1960, the police also confiscated three books, alleged to be obscene, from the Main Stem Book Store, at 1607 Broadway, New York. It is charged that the defendant owned or had control of both The Publishers' Outlet and the Main Stem Book Store.

As a result of the testimony presented to the Grand Jury, and at the direction of the Grand Jury, the District Attorney filed an Information, containing 198 counts, charging the defendant with the following:

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*Counts 1 to 62 inclusive,* with possession with intent to sell, of a number of books described in the said counts, which are alleged to be obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting. At the outset of the trial, the People moved to dismiss Counts 33, 34, 35, 36, 54, 55, 56 and 62, and they were dismissed.

*Counts 63 to 110 inclusive,* with publishing, manufacturing and preparing a number of books described in those counts, which are alleged to be within the proscription of subdivision 1 of Section 1141 of the Penal Law. At the outset of the trial, the People moved to dismiss Counts 94 and 105, and they were dismissed.

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*Counts 111 to 159 inclusive,* with unlawfully hiring, employing, using and permitting other persons to design, print, utter, publish, manufacture and prepare a quantity of books described in those Counts, which are alleged to be within the proscription of subdivision 1 of Sec-

tion 1141 of the Penal Law. At the outset of the trial, the People moved to dismiss Counts 143 and 154, and they were dismissed.

*Counts 160 to 198 inclusive,* with failing to imprint the true name and address of the publisher or printer on the books described in those Counts, in violation of Sections 330 and 331 of the General Business Law. At the outset of the trial, the People moved to dismiss Counts 191 and 195, and they were dismissed.

2165 The People called twenty-two witnesses and the defendant called two. We also have before us 94 exhibits offiered by the People and one exhibit offered by the defendant. The 94 People's exhibits included 54 books and 5 sets of cartoons. We read all of the books and cartoons.

Subdivision 1 of Section 1141 of the Penal Law provides in substance that "a person who sells * * * * or has in his possession with intent to sell * * * * obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book * * * * is guilty of a misdemeanor". That sec-
2166 tion uses the descriptive adjectives quoted above in addition to the objective "obscene", and it was held that all of those adjectives are synonymous with "obscene". (*People v. Brooklyn News Co.,* 12 Misc. 2d 768, 771).

The word "obscene" is derived from the Latin "obscenus", meaning "filthy, repulsive". Webster's Universal Dictionary defines "obscene" as "offensive to chastity and delicacy, impure, expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed."

Which each book must be viewed in its entirety, it does not mean that every page must be obscene for a book to be so judged. A book is obscene if it contains prohibited matter in such quantity or of such a nature as to flavor the whole and impart to the whole any of the qualities mentioned in the statute. The problem is to be solved, not by counting the pages, but rather by considering the impression likely to be created by them.

In *Roth v. United States*, 354 U. S. 476, the court, at page 484, said: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance". The court further held (page 489) that "obscenity is not within the area of constitutional protected speech or press". The test of obscenity, as laid down in the *Roth* case (page 489), is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to the prurient interest."

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Funk and Wagnalls New Standard Dictionary defines "prurient" as "inclined to lecherous thoughts and desires". While in recent times, some judicial opinions have been construed as holding that in these changing times former notions of propriety have, in many respects, been discarded, it is nevertheless true that "there

does emerge, somewhat hazily, the rule that an obscene book is one that tends to corrupt the morals of youth, or to lower the standards of right and wrong specifically as to the sexual relation. To be deemed obscene, it must show 'sexual impurity' and result in the exciting of lustful and lecherous thoughts and desires, or tend to stir sex impulses or to lead to sexually impure thoughts". (*People v. Berg,* 241 App. Div. 543, 544, 272 N. Y. S. 586, 588; affirmed 269 N. Y. 514; *People v. Larson,* 5 N. Y. S. 2d,
2171 55, 56; *People v. Pesky,* 230 App. Div. 200, 243 N. Y. S. 193, affirmed 254 N. Y. 373).

While it is true that, in determining what is obscene, "the law will not hold the crowd to the morality of saints and seers" (Cardozo, Paradoxes of Legal Science, 1928 ed. p. 37), yet if any book is "calculated to appeal to the baser instincts of mankind" it must be held to be violative of the statute. (*People v. Fellerman,* 243 App. Div. 64, 65, affirmed 269 N. Y. 629).

In writing the books before us, the respective authors made "no attempt to point to any les-
2172 son that might be of value to any one that would read them. It was just a clear attempt to portray filthy ideas." (*People v. Pesky,* 230 App. Div. 200, 202).

We accordingly hold that Exhibits 1 to 32 inclusive, 43 to 64 inclusive, and 68 to 72 inclusive, come within the proscription of the statute. They lack literary merit. They teach no lesson and point no moral. The authors of these books have not become distinguished by their place in the literary world nor by the quality of their style of writing. They wrote these books on order from the defendant. One of them, in

signing a contract for the sale of two of his manuscripts to the defendant (People's Exhibit 74) stipulated therein that his name should not appear as the author of the books. Another testified that the defendant wanted her to write a book full of sex scenes—"women making love to women, sodomy, lesbian scenes, spankings". She testified that she never wrote any book on these subjects before and that defendant gave her some books he had to aid her in her research. A third, who wrote a large number of these 2174
books at defendant's request, testified that in one instance, defendant gave him a book and asked him to expand on it; that defendant told him he wanted "wheels on female bodies and the darkening of flesh under flagellation". These books deal with sex in its most corrupt, sadistic, masochistic and degenerate form. They promote lust and portray filth for its own sake, or as Judge Woolsey called it in the *Ulysses* case (5 Fed. Sup. 182, 184), "dirt for dirt's sake".

The langauge of the Court of Appeals in *People v. Pesky,* 230 App. Div. 200, at page 204, is quite appropriate to the situation before us. 2175
The court there said: "These matters must be judged by normal people and not by the abnormal. Conditions would be deplorable if abnormal people were permitted to regulate such matters. Of course, there are some people who seem to be unable to find anything obscene in anything written. It is very clear that the author of the book now before us for consideration was not thinking of the spiritual, but devoted the whole book to the animal instincts of the human race. His efforts were not a lesson in morality, nor an attempt to uplift the mind

of the reader. * * * * * While some people may think this quite smart, a book of this kind, which has nothing to recommend it, and dealing only with such details, is properly held to be disgusting, indecent and obscene."

Having concluded therefore that the books described in the foregoing exhibits violate the statute, the question presented is whether the defendant's connection with the publication, possession and hiring of others to assist him in the
2177 commission of the crime charged against him, has been established beyond a reasonable doubt. In the main, the testimony against the defendant was given by witnesses who, under the law, are deemed accomplices. However, we find that such testimony was amply corroborated by independent proof. It must be borne in mind that corroboration need not extend to every element of the crime charged. Testimony in corroboration as to some material fact is all that the law requires. (*People v. Ogle,* 104 N. Y. 511, 515; *People v. Kress,* 284 N. Y. 452, 460; *People v. Sworsky,* 216 N. Y. 471, 480; *People v. Patrick,*
2178 182 N. Y. 131, 157). The evidence must be such as tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the triers of the facts that the accomplice is telling the truth. (*People v. Crum,* 272 N. Y. 348, 353; *People v. Patrick, supra,* p. 157; *People v. Malizin,* 4 N. Y. 2d, 22, 27; *People v. Lashkowitz,* 257 App. Div. 518, 13 N. Y. S. 2d, 663; *People v Dixon,* 231 N. Y. 111, 116, 117).

We hold that there is sufficient corroboration under the law of the testimony given by the accomplices as to the possession of the obscene books by the defendant with intent to sell them,

under subdivision 1 of Section 1141 of the Penal Law, and as to his having hired others to assist him in the manufacture and sale of these books and other prints, under subdivision 2 of that Section. We also find that the defendant had ample and full knowledge of the contents of these books, and that therefore, defendant's guilt under the above two subdivisions has been established beyond a reasonable doubt. (*People v. Finkelstein et al.*, 20 Misc. 2d, 1093, 195 N. Y. S. 2d 570, affirmed by the Appellate Division, 1st 2180
Department, N. Y. L. J. November 14, 1960).

We also find that the evidence establishes beyond a reasonable doubt that the defendant knowingly violated the provisions of subdivision 1 of Section 1141 of the Penal Law, which prohibits the publication of the books and prints declared obscene in Section 1141.

We finally come to the Counts of the information which charge the defendant with violating Sections 330 and 331 of the General Business Law. Section 330 requires that every publication printed or reprinted in this State after September 1, 1956, shall have conspicuously im- 2181
printed on the cover, title, or copyright page or at the end of the publication the *true name and address* of the publisher or printer. Violation of that section is made a misdemeanor under Section 331. These sections of the General Business Law are not limited to obscene publications only. The requirements apply to *all* publications in the State. The evidence before us discloses that when the defendant ordered the printing of the books in question, he either gave the printer a fictitious name and address of the publisher or instructed the printer to imprint

2182 *Opinion*

any name and address he could think of, without regard to the *true name and address* of the publisher. This constitutes a violation of the cited sections of the General Business Law.

Accordingly, the motion made by the defendant at the conclusion of the trial to dismiss the information, is denied with respect to Counts 1 to 32 inclusive; 37 to 53 inclusive; 57 to 61 inclusive; 63 to 65 inclusive; 67 to 87 inclusive; 89 to 93 inclusive; 95 to 99 inclusive; 101 to 104 inclusive; 106 to 113 inclusive; 115 to 135 inclusive; 137 to 141 inclusive; 164 to 175 inclusive; 177 to 182 inclusive; 185 to 190 inclusive; 192, 193, and 196 to 198 inclusive, and the defendant is found guilty on each of the above counts.

2183

The defendant's motion is granted with respect to Counts 66, 88, 100, 114, 136, 142, 149, 163, 176, 183, 184 and 194, and the defendant is acquitted on each of these counts.

BENJAMIN GASSMAN, J.

Breslin, P. J. and Galloway, J. concur.

2184

**Notice of Appearance.** 2185

COURT OF SPECIAL SESSIONS, CITY OF NEW YORK,

COUNTY OF NEW YORK.

PEOPLE OF THE STATE OF NEW YORK

*against*

EDWARD LISHKIN,

*Defendant.* 2186

SIR:

PLEASE TAKE NOTICE that the undersigned does hereby appear for the defendant in the above-entitled action.

Dated: New York, N. Y., June 5, 1961.

EMANUEL REDFIELD,
Attorney for Defendant,
Office & P. O. Address,
60 Wall Street,
New York 5, N. Y. 2187

To:

Clerk of the Court of Special Sessions
of the City of New York.

2188 **Stipulation as to Exhibits.**

NEW YORK SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*vs.*

EDWARD MISHKIN,

2189 *Defendant-Appellant.*

5014-1960

IT IS HEREBY STIPULATED, by and between the attorneys for the respective parties hereto, that the People's exhibits, used in the above-entitled actions, consisting of volumes of books and documents, need not be printed in the Record on Appeal, but will be handed up by counsel for either side upon the argument of the appeal herein.

2190 These exhibits are to be filed on or before the Wednesday preceding the first day of the term for which the appeal is noticed for argument.

Dated: New York, New York, October , 1961.

EMANUEL REDFIELD,
Counsel for Appellants.

FRANK S. HOGAN,
District Attorney,
Counsel for Respondent.

So Ordered.

## Clerk's Certificate.

2191

I, RAYMOND L. COLBY, Clerk of the Court of Special Sessions of the County of New York held in and for the County of New York, do hereby certify that the foregoing is a copy of the printed record on appeal to the Appellate Division, First Department, in the case of The People of the State of New York against Edward Mishkin convicted of the crime of selling obscene books.

Said record on appeal has been compared by me with the originals now on file in the Office of the Clerk of said Court and are correct transcripts therefrom and of the whole of such originals.

2192

Given under my hand and attested by the seal of this Court this day of October, in the year of our Lord one thousand nine hundred and sixty-one.

RAYMOND L. COLBY,
Clerk of the Court.

(Seal.)

2193

# ADDITIONAL PAPERS *RE* APPEAL TO COURT OF APPEALS.

**Defendant's Notice of Appeal.** 2197

CRIMINAL COURT OF THE CITY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

EDWARD MISHKIN,

*Defendant-Appellant.* 2198

SIRS:

PLEASE TAKE NOTICE that the defendant above named hereby appeals to the Court of Appeals of the State of New York pursuant to a certificate granting leave, dated December 13, 1962, by the Honorable Stanley H. Fuld, a Judge of the Court of Appeals, from so much of the judgment of the Appellate Division of the Supreme Court, First Judicial Department, made and entered the 27th day of November, 1962, which affirmed the judgment of conviction of the 2199
defendant, rendered by the Court of Special

2200 *Defendant's Notice of Appeal*

Sessions of the City of New York, County of New York, on the 14th day of December, 1960.

Dated: New York, N. Y., December 17, 1962.

Yours, etc.,

EMANUEL REDFIELD
Attorney for Defendant-Appellant
60 Wall Street
New York 5, New York
HA 2-1023

2201 To:

CLERK,
CRIMINAL COURT OF THE CITY OF NEW YORK
100 Centre Street
New York, N. Y.

FRANK S. HOGAN, Esq.
District Attorney, New York County
155 Leonard Street
New York, N. Y.

2202

**People's Notice of Appeal.** 2203

CRIMINAL COURT OF THE CITY OF NEW YORK,

COUNTY OF NEW YORK.

PEOPLE OF THE STATE OF NEW YORK,

*Appellant-Respondent,*

*against*

2204

EDWARD MISHKIN,

*Defendant-Appellant-Respondent.*

SIRS:

*Please take notice of the following:*

First, that the People of the State of New York hereby appeal to the Court of Appeals from that part of an order of the Appellate Division of the Supreme Court, First Department which reversed the conviction of the defendant on those counts of the information charging a violation of Section 330 of the General Business Law (Counts numbered 160-162, 164-175, 177-182, 185-190, 192, 193 and 196-198). 2205

Second, that the above described order, dated November 27, 1962, modified and affirmed a judgment of the Court of Special Sessions of the City of New York, New York County which was rendered on December 14, 1960.

2206 *People's Notice of Appeal*

Third, that this appeal is by permission of Honorable Stanley H. Fuld (Associate Judge of the Court of Appeals), who, pursuant to Section 520 of the Code of Criminal Procedure, issued the attached Certificate Granting Leave on December 13, 1962.

Dated, New York, New York, December 18, 1926

Yours, etc.,

2207 FRANK S. HOGAN
District Attorney
New York County

To:

Clerk of the Criminal Court
County of New York
100 Centre Street
New York 13, N. Y.

Emanuel Redfield
60 Wall Street
New York 5, N. Y.

2208

**Certificate Granting Leave to Appeal.** 2209

COURT OF APPEALS,

STATE OF NEW YORK.

Before:

Hon. Stanley H. Fuld, Associate Judge.

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THE PEOPLE OF THE STATE OF NEW YORK,

*Appellant-Respondent,* 2210

*against*

EDWARD MISHKIN,

*Defendant-Appellant.*

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I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to section 520 of the 2211
Code of Criminal Procedure permission is hereby granted.

(1) to the People to appeal from so much of the Appellate Division judgment as reversed the conviction of the defendant on those counts of the information (Nos. 160-162, 164-175, 177-182, 185-190, 192, 193 and 196-198) charging a violation of section 330 of the General Business Law and dismissed such counts and

2212 *Certificate Granting Leave to Appeal*

(2) to the defendant to appeal from so much of the judgment as affirmed the other counts of the information on which he was convicted. Bail for the defendant as at present provided is fixed pending appeal to the Court of Appeals in the sum of $5,000.

Dated at New York, New York, December 13, 1962

/s/ STANLEY H. FULD
Associate Judge

2213

Note: Appeal must be taken and certificate filed therewith within 15 days.

2214

**Judgment Appealed From.** 2215

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 27th day of November, 1962.

Present:

Hon. Benjamin J. Rabin,
Justice Presiding,
Hon. Francis L. Valente,
Hon. James B. M. McNally, 2216
Hon. Samuel W. Eager,
Hon. Aron Steuer,
Justices.

5238

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THE PEOPLE OF THE STATE OF NEW YORK,
*Respondent,*

*vs.*

EDWARD MISHKIN, 2217
*Defendant-Appellant.*

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An appeal having been taken to this Court by the defendant-appellant from the judgment of the Court of Special Sessions of the City of New York, New York County, rendered on the 14th day of December, 1960, convicting defendant of the crimes of Unlawfully Possessing Obscene Books with Intent to Sell (Penal Law,

§1141), Unlawfully Publishing Obscene Books, Hiring Others to Prepare Obscene Books and Failing to Print Publisher's and Printer's Name and Address, and said appeal having been argued by Mr. Emanuel Redfield of counsel for the appellant, and by Mr. Peter J. O'Connor of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion *Per Curiam* of this Court filed herein,

It hereby is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby modified, on the law, by deleting therefrom the conviction on Counts 160 through 162, 164 through 175, 177 through 182, 185 through 190, 192, 193, and 196 through 198, and, as so modified, the judgment is affirmed.

ENTER:

VINCENT A. MASSI
Clerk.

**Opinion.** 2221

(17 A. D. 2d 243.)

*Per Curiam:*

Defendant was convicted in the Court of Special Sessions of multiple crimes in the possession and publication of obscene books and hiring others to prepare obscene books. We have considered the several specifications of error in connection with these convictions and find nothing prejudicial to defendant therein. Defendant was also convicted of 32 violations of General Business Law, §330, a misdemeanor, and fined $500. For the reasons stated, we find this conviction to be unsupportable. 2222

General Business Law, §330, subd. 2, provides that every publication printed after September 1, 1956 (other than newspapers, magazines or other periodicals for which separate provision is made) published in this state shall have conspicuously printed in certain specified places the name and address of the publisher or printer. Section 331 makes the failure to carry out the provisions of the preceding section a misdemeanor. That the defendant, in the instances charged, published books which contained no imprint of his name or address was amply established. The difficulty with the conviction is that the section is unconstitutional. 2223

The constitutionality of the section has never been tested. However, similar statutes in other states have been questioned (*Talley v. California*, 362 U. S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559; *Schneider v. State*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155). The ordinances involved in those cases dealt with handbills. But the vice of the restriction applies to other publications,

particularly, as here, books. "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind" (*Talley v. California, supra,* 64, 80 S. Ct. 538). The gist of the holding is that before the state can require such a disclosure some grounds for the restriction of free expression resulting must be found in the statute or otherwise established. No such grounds appear in the statute.

2225 The district attorney suggests that the statute may be found constitutional if its application is limited to obscene publications for there would be a purpose in facilitating the discovery of the publisher. But the statute itself is not so limited, and there is nothing to indicate that this was the legislative purpose. We do not reach the question whether such a purpose would validate the statute.

The judgment of conviction should be modified on the law by deleting therefrom the conviction on Counts 160 through 162, 164 through 175, 177 through 182, 185 through 190, 192, 193, and 196 2226 through 198, and, as so modified, affirmed.

All concur.

**Certification Pursuant to Rule 2105.** 2227

I, EMANUEL REDFIELD, attorney for the defendant-appellant-respondent in this action, do hereby certify, pursuant to Rule 2105, that the foregoing printed record on appeal to the Appellate Division, First Department, and additional papers to the Court of Appeals consisting of the notices of appeal to the Court of Appeals, the judgment appealed from and the opinion have been personally compared by me with the originals and found to be true and complete copies of said originals and the whole thereof 2228
now on file in the office of the Clerk of the Criminal Court of the City of New York, County of New York.

Dated: April , 1964.

EMANUEL REDFIELD,
Attorney for Defendant-Appellant-
Respondent.

2229

[fol. 745]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of December, in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding,

Raymond J. Cannon, Clerk.

---

THE PEOPLE, etc., Respondent-Appellant,

—against—

EDWARD MISHKIN, Appellant-Respondent.

---

REMITTITUR—December 3, 1964

Be It Remembered, That on the 28th day of April, in the year of our Lord one thousand nine hundred and sixty-four, Edward Mishkin, the appellant-respondent, in this cause, came here unto the Court of Appeals, by Emanuel Redfield, his attorney and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. The People, etc., the respon-

[fol. 746] dent-appellant, in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney, and filed a Notice of Appeal from the order of said Appellate Division.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did

order and adjudge that the judgment and order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment and order be affirmed, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court before the Judges thereof.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, December 3, 1964.

[fol. 747] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 748]

IN CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

---

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent-Appellant,

—against—

EDWARD MISHKIN, Defendant-Appellant-Respondent.

---

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—December 15, 1964

SIR:

I. Notice is hereby given that Edward Mishkin hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dated December 3, 1964, which affirmed the order of the Appellate Division, First Department, dated and entered November 27, 1962, which affirmed the judgment of conviction of the defendant by the Court of Special Sessions (now the Criminal Court of the City of New York).

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2). Appellant was convicted for violations of Section 1141 of the Penal Law and was sentenced to three years imprisonment and to pay a fine of $12,500. Appellant is now at liberty on bail.

II. The Clerk will please prepare a transcript of the record of this cause for transmission to the Clerk of the Supreme Court of the United States and include in said [fol. 749] transcript, the following:

(1) This Notice of Appeal and proof of service thereof;

(2) The Remittitur of the Court of Appeals;

(3) Any order that may be made amending said Remittitur;

(4) The Record on Appeal filed in the Court of Appeals; and

(5) The Exhibits in the Record on Appeal.

III. The following questions are presented by this appeal:

(1) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States in that it proscribes publications that are sadistic and masochistic?

(2) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of sadism and masochism?

(3) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of obscenity?

(4) Was Section 1141 of the Penal Law unconstitutionally applied to the publications in this case?

(5) Are the publications obscene within the construction of the Fourteenth Amendment to the Constitution of the United States?

[fol. 750] (6) Was the Fourteenth Amendment violated by the conviction of the appellant without proof that he knew the obscene nature of the contents of the publications?

(7) Were the searches of and seizures at the appellant's premises in violation of the Fourth Amendment to the Constitution of the United States?

Dated: New York, New York, December 15, 1964.

Emanuel Redfield, Attorney for Appellant, Office & P. O. Address, 60 Wall Street, New York 5, New York.

[fol. 751]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

CLERK'S CERTIFICATE

I, Antonio Godino, Court Clerk of the Criminal Court of the City of New York held in the county of New York, do hereby certify that the foregoing is a copy of the printed record on appeal to the Court of Appeals, First Department, in the case of the People of the State of New York against Edward Mishkin convicted of the crime of selling obscene books.

Said record on appeal has been compared by me with the originals now on file in the office of the Clerk of said Court and are correct transcripts therefrom and of the whole of such originals.

Given under my hand and attested by the seal of this Court this 28th day of December, in the year of our Lord one thousand nine hundred and sixty four.

---

[fol. 752]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of January A. D. 1965.

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 37

---

THE PEOPLE &c., Respondent,

vs.

EDWARD MISHKIN, Appellant.

---

ORDER AMENDING THE REMITTITUR—January 7, 1965

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appel-

lant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Defendant argued that section 1141 of the Penal Law of the State of New York is invalid under the Constitution of the United States for proscribing sadistic and masochistic publications in general and as applied to the publications in this case in particular and, also, for vagueness; and, further, that his rights under the Fourth and Fourteenth Amendments to the Constitution were violated, respectively, by unlawful searches and seizures and by his conviction without proof that he was aware of the obscene nature of the publications. This Court held that section 1141 of the Penal Law was valid and that there was no violation of the rights of defendant either under the Constitution of the United States or the Amendments thereto.

And the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Gearon Kimball, Deputy Clerk.

[fol. 753]

SUPREME COURT OF THE UNITED STATES

No. 858—October Term, 1964

---

EDWARD MISHKIN, Appellant,

v.

NEW YORK.

---

Appeal from the Court of Appeals of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—April 5, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 807.

E COPY

FILED
JAN 26 1965
JOHN F. DAVIS, CLE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 49

EDWARD MISHKIN,

Appellant,

*against*

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## STATEMENT AS TO JURISDICTION

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
60 Wall Street,
New York 5, New York.

## INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 3 |
| Statute Involved | 3 |
| Statement | 4 |
| Stage and Manner of Raising Federal Questions | 5 |
| The Questions Are Substantial | 5 |
| Conclusion | 9 |
| Appendix A: | |
| Judgment of Court of Appeals | 11 |
| Appendix B: | |
| Order Amending Remittitur | 13 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

EDWARD MISHKIN,

Appellant,

*against*

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## STATEMENT AS TO JURISDICTION

### Opinions Below

The Court of Appeals did not write an opinion. The Appellate Division did not write an opinion. The trial court did write an opinion which is reported in 26 Misc. 2d 152, and is also found at page 720 of the Record of Appeal.

### Jurisdiction

(i) This case arises from the conviction of the appellant for having published, possessed for sale, and employ-

ing others for that purpose in violation of Section 1141 of the Penal Law of New York. The defendant faces a sentence of three consecutive years imprisonment and fines aggregating $12,000.

(ii) The judgment of affirmance by the New York Court of Appeals was made and entered on December 3, 1964.

A motion to amend the remittitur of the Court of Appeals was granted, and an order to that effect was entered on January 7, 1965. The order directed that the remittitur be amended to read as follows:

> "Defendant argued that Section 1141 of the Penal Law of the State of New York is invalid under the Constitution of the United States for proscribing sadistic and masochistic publications in general and as applied to the publications in this case in particular and, also, for vagueness; and, further, that his rights under the Fourth and Fourteenth Amendments to the Constitution were violated, respectively, by unlawful searches and seizures and by his conviction without proof that he was aware of the obscene nature of the publications. This Court held that Section 1141 of the Penal Law was valid and that there was no violation of the rights of defendant either under the Constitution of the United States or the Amendments thereto." (Appendix B)

The Notice of Appeal was filed on December 16, 1964 in the Criminal Court of the City of New York.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Section 1257 (2).

(iv) The following decision sustains the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York,* 333 U. S. 507.

## Questions Presented

(1) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States in that it proscribes publications that are sadistic and masochistic?

(2) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of sadism and masochism?

(3) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of obscenity?

(4) Was Section 1141 of the Penal Law unconstitutionally to the publications in this case?

(5) Are the publications obscene within the construction of the Fourteenth Amendment to the Constitution of the United States?

(6) Was the Fourteenth Amendment violated by the conviction of the appellant without proof that he knew the obscene nature of the contents of the publications?

(7) Were the searches of and seizures at the appellant's premises in violation of the Fourth Amendment to the Constitution of the United States?

## Statute Involved

Section 1141 of the Penal Law, in pertinent part, reads as follows:

> "1. A person who * * * has in his possession with intent to sell, lend, distribute * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or

prints, utters, publishes, or in any manner manufacturers, or prepares any such book * * * or who,

"2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them.

"Is guilty of a misdemeanor * * *."

## Statement

Permission was granted to appeal to the Court of Appeals by a judge of that court, who certified that there were questions involved which ought to be reviewed by that court. Thereafter, that court affirmed the conviction. The conviction carries a sentence of three (3) consecutive years of imprisonment and fines totalling $12,000.

The pertinent charges against appellant are 159 counts classified as follows:

Counts 1 through 62 deal with unlawful possessing with intent to sell certain "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting" books,—all characterizations stated conjunctively.

Counts 63 through 110 deal with unlawful publishing the aforesaid books,—characterized conjunctively.

Counts 111 through 159 charged him with unlawfully hiring others to prepare said books,—also characterized conjunctively.

The record does not show that appellant knew the nature of the contents of the books. And if he is to be assumed to have known, constructively, there is also lacking any proof in the record that appellant knew the character of the books whether they were obscene, sadistic, masochistic and disgusting as charged by the Information or proscribed by the statute.

He was found guilty of 140 of the counts (Rp. 699).

## Stage and Manner of Raising Federal Questions

The questions here presented were raised and passed upon by the Court of Appeals, as its certificate indicates (App. B). *Home Insurance Co.* v. *Dick,* 281 U. S. 397. The same questions were raised in appellant's brief in the Appellate Division.

The questions were raised at the trial by motion, and overruled (Rp. 126, 127, 135, 136, 682, 683, 699).

## The Questions Are Substantial

1. The first question raises the problem concerning books that are sought to be condemned as sadistic or masochistic. This court has never passed on the question whether the use of such language is vague; and if the language is clear whether such publications may be proscribed without offending the First Amendment. The statute speaks about obscene, sadistic or masochistic books. The Information accuses the defendant of the possession and publication of them in conjunction with obscenity. Indeed, the appellee took the position that the books involved in this prosecution fell into the category of sadistic and masochistic (Rp. 132).

This court has held that only obscene books are not protected by the Constitution (*Roth* v. *United States,* 354 U. S. 476). Descriptions of human baseness, or irregularity or perversion cannot be legislatively condemned. *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684; *Yates* v. *United States,* 354 U. S. 298; *Grove Press* v. *Gerstein,* 34 Sup. Ct. Reporter 1909; *Manual Enterprises* v. *Day,* 370 U. S. 478; *Trolins* v. *Gerstein,* 84 Sup. Ct. Reporter 1903; *Times Film Corp.* v. *Chicago,* 355 U. S. 35; *Jacobellis* v. *Ohio,* 378 U. S. 184; *One, Inc.* v. *Oelsen,* 355 U. S. 371.

2. The words sadism and masochism have a broad meaning. In general they refer to acts of cruelty which afford

pleasure to the actor; and conversely masochism is the enjoyment of the cruelty by the receiver. In that sense, publications with such qualities suffer from the same vagueness as this court found in publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime". *Winters* v. *New York,* 333 U. S. 507.

The bloodletting in Shakespeare, the Bible, Greek drama and even in our contemporary "westerns" would suffer like condemnation as appealing to the gory and the cruel.

Since this charge against appellant was stated with obscenity and the appellee tried the case on the theory that the books were sadistic and masochistic, there is no way of separating a theory that books are obscene rather than sadistic. Accordingly, under the doctrine of *Stromberg* v. *California,* 283 U. S. 359, 368 and *Winters* v. *New York,* a reversal must follow if the statute is infirm in prohibiting publications.

3. Another question raised by this appeal is failure of the prosecution to prove either (1) that appellant knew the contents of the books, or knew them to be of the character condemned by the statute. The case was tried on the theory by the court that it was not necessary under New York law that there be proof of knowledge by the accused of either the contents or the character of the contents (Rp. 689-690).

Actual knowledge of the contents of a book by the accused must be established. There is no proof that appellant knew the contents of the books. It is therefore submitted that the proof fell short of the requirement of *Smith* v. *California,* 361 U. S. 147.

4. Ancillary to this question is the additional requirement of the *Smith* case that it be shown that the accused knew that the books were obscene, sadistic, masochistic and disgusting. In order to punish for publishing, it is necessary that it be proved that the defendant have an

evil attitude, that a *mens rea* be shown. This court said in *Smith*, p. 154: "by penalizing booksellers even though they had not the slightest notice of the *character* of the books they sold"; and again, at p. 154, "falsely deny reason to suspect their *obscenity*".

Justice Black, in concurrence, said (p. 156): "The court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an 'obscene' book even though he is unaware of its *obscenity*". Likewise, Justice Frankfurter noted (p. 161), "But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with *knowledge of the obscenity*".

Thus, this court made knowledge of the *character* of a publication as a factor in proof of the crime. So that it is not knowledge of the contents alone that must be proved, but also the character of the contents. In this case there is neither proof.

5. Another question raised by this appeal is the challenge to the obscenity law, Section 1141, as applied to these publications. In *Roth* v. *United States*, 354 U. S. 476, the test was laid down, whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to prurient interests. Since it is prurient interests to whom the books must appeal, the question is, do these books appeal to such interests? At worst, these books can be described as trashy or vulgar. Instead of being aphrodisiac they probably are a bore. The trial court found them "sickening" (Rp. 716). Such characterization is inconsistent with appeal to pruriency. They would have the opposite effect. Instead of stimulating the erotic, they disgust and sicken. Such effect is not what *Roth* condemned.

6. Ancillary to this question, the appellant raises the point of the adequacy of the definition of obscenity in *Roth*. For if it was difficult to determine the meaning of the

statute before *Roth,* the handicap of vagueness still persists. Emerson-Toward a General Theory of the First Amendment, 72 Yale L. J. 877, at 938. The guessing at what the statute forbids and what it permits has resulted in a three-year prison sentence imposed on this appellant. It does not comport with justice that a man be denied his freedom for three years because he guessed wrongly at the meaning of a statute.

The books in question are in principle with those in *Grove Press Inc.* v. *Gerstein, supra,* and in *Tralins* v. *Gerstein, supra.* They may not have been written as skillfully as the ones in the cases cited. But their character is the same. In all of them, the dominant theme is erotic. Literary skill or excellence is not the criterion for absolving a book, for if it were so, then courts would have to become literary critics and arbiters of desirable standards of literature. Compare what was said in *Winters* v. *New York,* 333 U. S. 507, 510: "What is one man's amusement teaches another's doctrine. Though we see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature".

7. Another question raised herein concerns itself with the wholesale seizures of books and their use against appellant. The case was commenced and tried before the decision of this court in *Mapp* v. *Ohio,* 367 U. S. 643. Until then, New York was governed by the decision in *People* v. *Defore,* 242 N. Y. 13, which allowed in evidence materials seized even in violation of the Fourth Amendment. Accordingly, the trial court neither explored the question when raised nor was the New York procedure fashioned in any manner to receive such challenges.

The evidence is that six police officers went to a building at 37 West 20th Street, New York City and in a basement room about 25 by 30 feet and 12 feet high, where a "quantity" of books were seen, and they "seized them

all'' (Rp. 134). The prosecution promised to produce the police officer, who it was alleged, obtained a search warrant (Rp. 136). This was never done.

The tally of the amount of books seized shows that 17,121 volumes were seized (Rp. 139-143). It took two days to remove all the books in the room (Rp. 137). Exhibits 1 through 42 referred to in the Information were among those seized in that room (Rp. 137). This case involves a more flagrant seizure than in *A Quantity of Books* v. *Kansas,* 12 L. ed. 2d 809, for in the *Kansas* case at least an attempt was made toward specificity in the search warrant and the district judge there held a 45-minute hearing in which he examined the books. In this case nothing was done to substantiate the alleged search warrant, although the prosecution had promised to do so (Rp. 136). And the testimony as to the exhibits was received subject to the production of that witness.

The subject was not further pressed or pursued, no doubt, because of existing New York law. But since the issue was raised, the constitutional question remained open, *People* v. *Loria,* 10 N. Y. 2d, 368; *People* v. *Coffey,* 11 N. Y. 2d, 142. The issue therefore is still before this court to determine whether the seizures of literature was consistent with constitutional protections. *Marcus* v. *Search Warrants of Property, etc.,* 367 U. S. 717; *Jones* v. *United States,* 357 U. S. 493; *Kremen* v. *United States,* 353 U. S. 346.

As to the remaining volumes used in evidence, no warrant for their seizure in large quantities was obtained (Rp. 145-156), and the principles of the *Marcus, Mapp* and *Kansas* cases were violated.

## Conclusion

It has been shown that several novel questions of substantiality are presented which should be reviewed by this

court. Surely, a man facing a three-year prison sentence for the distribution of books should have every opportunity afforded him for the protection of his constitutional rights.

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant,
Office & P. O. Address,
60 Wall Street,
New York 5, New York.
212 HAnover 2-1023

## APPENDIX A

### Judgment of Court of Appeals

COURT OF APPEALS

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of December, in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

Remittitur December 3, 1964.

---

THE PEOPLE, etc.,
Respondent-Appellant,

*against*

EDWARD MISKIN,
Appellant-Respondent.

---

BE IT REMEMBERED, That on the 28th day of April, in the year of our Lord one thousand nine hundred and sixty-four, EDWARD MISHKIN, the appellant-respondent, in this cause, came here unto the Court of Appeals, by EMANUEL REDFIELD, his attorney and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. THE PEOPLE, etc., the respondent-appellant, in said cause, afterwards appeared in said Court of Appeals by FRANK S. HOGAN, District Attorney, and filed a Notice of Appeal from the order of said Appellate Division.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the judgment and order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment and order be affirmed, as aforesaid.

AND hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court before the Judges thereof.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 3, 1964.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

SEAL

RAYMOND J. CANNON,
Clerk.

## APPENDIX B

### Order Amending Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of January, A. D. 1965.

Present, HON. CHARLES S. DESMOND, Chief Judge, presiding.

---

Mo. No. 37

THE PEOPLE &c.,

Respondent,

vs.

EDWARD MISHKIN,

Appellant.

---

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Defendant argued that section 1141 of the Penal Law of the State of New York is invalid under the Constitution of the United States for proscribing sadistic and

masochistic publications in general and as applied to the publications in this case in particular and, also, for vagueness; and, further, that his rights under the Fourth and Fourteenth Amendments to the Constitution were violated, respectively, by unlawful searches and seizures and by his conviction without proof that he was aware of the obscene nature of the publications. This Court held that section 1141 of the Penal Law was valid and that there was no violation of the rights of defendant either under the Constitution of the United States or the Amendments thereto.

And the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

.....

Deputy Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 20 1965
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1964

No. [redacted] 49

EDWARD MISHKIN,

*Appellant,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Appellee.*

## MOTION TO DISMISS

FRANK S. HOGAN
*District Attorney*
New York County

H. RICHARD UVILLER
JOSEPH A. PHILLIPS
ALAN F. LEIBOWITZ
Assistant District Attorneys
*Of Counsel*

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| JURISDICTION | 1 |
| STATEMENT | 2 |
| I Preparation of the Obscene Books | 2 |
| II Possession of the Obscene Books | 3 |
| (A) As to the warehouse | 4 |
| (B) As to the publisher's outlet | 5 |
| III Printing of the Obscene Books | 5 |
| The Exhibits | 7 |
| The covers | 7 |
| The contents | 8 |
| STATUTE INVOLVED | 10 |
| NO SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED | 10 |
| (1) Section 1141 of the Penal Law is Constitutional | 10 |
| (2) *Scienter* was Clearly Established | 13 |
| (3) The Evidence was Lawfully Seized | 15 |
| Concerning the seizure at the warehouse | 15 |
| Concerning the seizure at the bookstores | 16 |
| CONCLUSION | 17 |

## TABLE OF AUTHORITIES

PAGE

***Cases:***

Ellison v. United States, 206 F. 2d 476 (D. C. Cir. 1953) ..... 16

Hester v. United States, 265 U. S. 57 (1924) ..... 16

Jacobellis v. Ohio, 84 S. Ct. 1676 (1964) ..... 10

Marcus v. Search Warrants, 367 U. S. 717 (1961) ..... 17

People v. Finkelstein, 9 N. Y. 2d 343 (1961) ..... 10, 14
People v. Finkelstein, 11 N. Y. 2d 300 (1962) ..... 9
People v. Loria, 10 N. Y. 2d 360 (1961) ..... 17
People v. Richmond County News, 9 N. Y. 2d 578 (1961) ..... 11, 13
People v. Wilson, 16 App. Div. 2d 207 (1st Dept. 1962) 16

Roth v. United States, 357 U. S. 477 (1957) ..... 10, 11, 13

United States v. Eldridge, 302 F. 2d 463 (4th Cir. 1962) ..... 15
United States v. Goodman, 190 F. Supp. 847 (N. D. Ill. 1961) ..... 15
United States v. Lee, 274 U. S. 559 (1927) ..... 16
United States v. Lefkowitz, 285 U. S. 452 (1932) ..... 16
United States v. Sferas, 210 F. 2d 69 (7th Cir. 1954) 15

Winters v. New York, 333 U. S. 507 (1948) ..... 13

***Statutes:***

28 U. S. C. 1257 (2) ..... 1
New York Penal Law §1141 ..... 1, 2, 10, 13

IN THE

# Supreme Court of the United States

October Term, 1964

No. .....

EDWARD MISHKIN,

*Appellant,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK

*Appellee.*

## MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above-entitled action on the ground that it does not present a substantial federal question.

### Jurisdiction

The appellant seeks to invoke this Court's jurisdiction under 28 U. S. C. §1257 (2) by contending *inter alia* that Section 1141 of the New York Penal Law is unconstitutionally vague.

## Statement

The petitioner was convicted on December 14, 1960, after a trial in the Court of Special Sessions of the City of New York, of fifty-four crimes of UNLAWFULLY POSSESSING OBSCENE BOOKS (Penal Law, §1141), forty-three crimes UNLAWFULLY PUBLISHING OBSCENE BOOKS (*ibid.*), and forty-three crimes of HIRING OTHERS TO PREPARE OBSCENE BOOKS (*ibid.*). He was sentenced to serve penitentiary terms aggregating three years, and, in addition, fines totalling $12,500 were imposed (363-5, 2152-7).*

The Appellate Division modified and affirmed the judgment of conviction on November 27, 1962, and the Court of Appeals affirmed the order of the Appellate Division on December 3, 1964.

The trial record clearly depicted the defendant not as a casual practitioner of the art of pornography in the manner of a street corner vendor but, rather portrayed him as a major entrepreneur of that industry. The record forcefully established that the defendant hired others to prepare obscene books, published obscene books with calculated anonymity—and possessed obscene books with intent to sell [Penal Law, §1141].

### I Preparation of the Obscene Books

Three writers and two artists testified that they had been hired by the defendant to write and illustrate most of the books in evidence (Exhs. 1-3, 5, 21-30, 32-4, 43-4, 60, 69-72). Each of the authors was directed to deal with sex in

* References, unless otherwise indicated, are to the Trial record.

an unusual manner (Hackshaw 1227-35; Johnson 1297-8, 1301-2, 1307, 1337-8; Rosen 1187).

Leotha Hackshaw was told to produce a book "full of sex scenes and lesbian scenes * * * the sex had to be very strong, it had to be very rough, it had to be clearly spelled out * * * the sex scenes had to be unusual sex scenes between men and women * * * he wanted scenes in which women were making love with women * * * lesbian scenes * * * and men making love to men, and there were spankings and scenes-sex in an abnormal and irregular fashion" (1227-35). She was also given instruction to emphasize "beating and fetishism" (1242). In addition to lesbian themes, Kenneth Johnson was instructed to "deal graphically with the implementation of wheels on a female's body, of the darkening of flesh under flagellation" (1307, 1337-8).

Under the defendant's direction, the artists produced numerous illustrations for the various exhibits (Stanton 1433-45; Bilbrew 1588-1611).

The writers and artists dealt with Mishkin at his store —Publisher's Outlet—which is located on West 42nd Street in the Times Square area (Rosen 1189-91, 1193-5; Hackshaw 1236, 1238-9; Johnson 1280-1, 1298, 1304, 1311-2, 1317, 1322, 1330, 1342; Stanton 1434-65; Bilbrew 1593, 1598-9, 1601-10).

## II Possession of the Obscene Books

As previously noted, the defendant was charged with possession of a variety of obscene books at two locations, the warehouse and Publisher's Outlet. The initial counts

(1-32) are predicated on the possession of books found at the warehouse. The subsequent possession counts (36-53, 56-61, 63) are based on the books located at Publisher's Outlet. The record is more easily comprehended if the facts and circumstances relating to each location are separately stated.

***(A) As to the warehouse***

Upon the completion of the printing and binding most of the obscene books were stored in a warehouse located at 37 West 20th Street (Levenberg 546, 555-6, 1031). At the defendant's request Levenberg rented part of a warehouse to store Mishkin's books (547-55). Pursuant to an agreement Mishkin gave him one hundred dollars which he turned over to the landlord monthly (555). Initially, Mishkin had an employee who cared for the stock at the warehouse, filled orders and delivered books to the stores (564-8). After Mishkin fired the employee, Levenberg took on those additional duties (564-8). When the police began to close in on the defendant's operation, Mishkin told Levenberg to get rid of everything at the present shop and to stay away from the warehouse because "it was hot" (561-2, 823-6). Because his name was on the lease for Room 908 of the warehouse, Levenberg disregarded Mishkin's directions, went to the warehouse and moved the books to the warehouse basement (562).

For several weeks prior to January 12, 1960, Police Inspector Plansker was in the vicinity of the warehouse (471-9). During that time, he observed Levenberg use a bunker room in the basement of the building (471-9). On January 12, 1960, Plansker executed a search warrant at the ware-

house (398-401). In the basement room, the police found thousands of books comprising thirty-two of the titles in evidence (411-2, 415-29).

***(B) As to the publisher's outlet***

Publisher's Outlet is a large retail book store located at 254 West 42nd Street (429-30, 432). The defendant referred to the Outlet as "his store" (Levenberg 535-6; Vaccarella 1679-84, 1704-32) and conducted most of his business dealings from there (Levenberg 535-6, 546, 566-8, 822-3, 1031; Hayman 1127, 1129-34; Stanton 1434-65; Johnson 1281, 1298, 1311, 1317, 1342; Bilbrew 1593, 1598-610; Rosen 1189-91, 1193-5; Liberman 1641-3; Vaccarella 1674-6, 1679-84, 1704-32; Dryer 1960-2). The financial records of the Outlet corporation show that the defendant was an employee of the corporation who received a salary of $175.00 per week although the president of the corporation received only $100.00 for the same period (Abrams 1931-56).

For several weeks in December of 1959, the police were observing the activities at Publisher's Outlet (Plansker 477). Five police officers went to the book shop on December 29, and arrested three individuals (Plansker 467-70). They also seized over two hundred obscene books bearing twenty-two different titles (Exhs. 43-67; 432-49).

## III Printing of the Obscene Books

Two photo offset printers were employed by the defendant to print the obscene books. Norman Levenberg printed all but three of the obscene books (Exhs. 1-30, 34-72; 518-25) and Paul Hayman did the rest (Exhs. 31-3; 1118-31, 1137).

Levenberg outlined the printing procedure. Mishkin would telephone him when he had a printing job (534-5). Levenberg would go to Mishkin's store where the defendant would give him a manuscript or a previously printed book (535-7). If a manuscript were involved the printer also received a picture for the book jacket and would be told what price to place on the cover (540, 546-7). If the manuscript were thin, additional instructions were given for padding the book to make it look thicker (540-1). The printer was also told to fabricate the name and address of a publisher and place it on the printed books (542-3). Quantities of one to five thousand books, at prices from fifteen to forty cents, were ordered by the defendant (575-8).

Levenberg then photographed the copy, made up photo-offset printing plates and printed the contents of the books in sheet form—an intermediate step of typesetting was required when he worked directly from a manuscript (537-40, 758-9). After the press run had been completed, Levenberg would take the printed sheets to a binder who would fold the sheets into book form and bind them (539, 759).

When the printing was completed Levenberg would place the books in a warehouse except for fifty copy sets which would be taken to each of the defendant's stores, Publisher's Outlet and Midget Book Shop (546, 1031). Levenberg, who was always paid in cash by the defendant, received as much as a thousand dollars on occasion (564, 576-8).

The prosecution also called two binders and a typesetter who testified that they had done binding and typing

work for Levenberg on a number of the obscene books (Yeeto 1732-76; Shaller 1793-4, 1799-1817; DeNino (by stipulation) 1825-31).

## The Exhibits

The books in evidence involve fifty different titles. The probative force of the exhibits is two-fold. An analysis of the apparent characteristics of the material is pertinent to a finding of *scienter*. The contents of the exhibits, of course, are the substance of the crime charged.

### *The covers*

The jackets and backing of most of the exhibits have illustrations which relate to the subject matter of the book. The covers of about nineteen of the books display women being whipped, beaten, tortured or abused (Exhs. 3, 4, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 31, 51, 52, 53, 55, 56). Practically all the book jackets depict symbols associated with fetishism (Exhs. 7, 9, 24, 45, 53 do not). One jacket depicts a lesbian seduction scene (Exh. 71, Stud Broad). Numerous exhibits display partially clothed or nude women whose breasts and buttocks are greatly exaggerated (see e.g., 2, 5, 12, 13, 23, 25, 26, 29, 46, 49, 55, 69, 71, 72). In addition to the illustrations the book jackets also reflect the titles in large print. A few of the more colorful titles are: "Swish! Bottom!" (Exh. 29), "The Dance with the Dominant Whip" (Exh. 11), "Colt of the Spankers" (Exh. 12), "Bound in Leather" (Exh. 47), "Fearful Ordeal in Restraintland" (Exh. 18) and "Return Visit to Fetterland" (Exh. 17).

It is further observed that some of the books have been printed in foreign countries (Exhs. 11, 12) and are restricted to a limited group of subscribers (Exhs. 1, 3, 5, 6, 8, 13, 29, 57).

Such cover blurbs as—"For Sophisticated Collectors of the Unusual," and "a novel of bondage," "The Story of the Creation of a Lesbian" and "The Unusual Story of a Woman Flagellant" (Exhs. 8, 29, 57, 71)—are present.

A note on the prices of the exhibits is pertinent. Although all of the books are of the pocket-book variety most of the exhibits are marked to sell at exorbitant prices [see *e.g.*, "Confession" (Exh. 13, 127 pp. at $15.00); "Chances Go Round" (Exh. 1, 50 pp. at $10.00); "Female Sultan" (Exh. 3, 150 pp. at $10.00)]. Fifteen other books sell for either four or five dollars and all contain less than one hundred and sixty pages (Exhs. 2, 4, 25, 26, 27, 28, 29, 30, 57, 60, 69, 70, 71, 72, 73).

***The contents***

The contents of this material is not easily categorized. The dominant theme of the matter is obvious. Subordinant themes, however, run across classification lines and indicate that the subject has multiple sexual elements interwoven. These elements may be roughly denominated as dealing with sado-masochism, fetishism, homosexuality and miscellaneous other sexual aberrations.

A large group of the exhibits may be denominated bondage or sado-masochistic books [Exhs. 14, 15, 16, 17, 18, 19, 20, 21, 51, 52, 53, 55, 56, 61, 62, 63, 64, 68]. This group

of exhibits is predominantly devoted to depicting pictorially and verbally innumerable scenes in which individuals are being tortured in varied and fantastic ways. In these sado-masochistic scenes, the victims of the many and varied atrocities are usually referred to as being in bondage or slavery. The victims, moreover, although portrayed in agony, experience pleasure. Sexual fetishism is also prevalent here (spike type heels, leather boots, tight clothing, gloves, whips, ropes and belts).

The "spanking" exhibits involve mistreatment of the victims which is slightly less destructive (Exhs. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 43, 44, 45). However, these exhibits all deal in great detail with whippings, beatings and spankings. Some are illustrated with pictures of the various punishments and the devices utilized. Others are more concerned with the incidents of sexual seduction, transvestism and fetishism which are liberally interspersed throughout the sado-masochistic "chastisements."

The final group of exhibits present multiple and particularized incidents of sexual seduction (homosexual and heterosexual), sodomy, rape, and masturbation [Exhs. 2, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 60, 69, 70, 71, 72]. Exhibit 72 in this record is a book entitled, "Queen Bee" which was found to be obscene by the New York Court of Appeals in *People* v. *Finkelstein* [11 N. Y. 2d 300 (1962)]. The rest of the books may be best described as efforts to duplicate or surpass that book in lewdness. Indeed, eight of the other books in this category were written by the author of "Queen Bee" (Exhs. 2, 27, 28, 30, 60, 69, 70, 71).

## Statute Involved

Section 1141 of the Penal Law, in pertinent part, reads as follows:

> "1. A person who * * * has in his possession with intent to sell, lend, distribute * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic * * * book * * * or prints, utters, publishes, or in any manner manufactures, or prepares any such book * * * or who,
>
> "2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,
>
> "Is guilty of a misdemeanor * * *."

## No Substantial Federal Questions are Presented.

### (1) Section 1141 of the Penal Law is Constitutional.

To invoke this Court's direct appellate jurisdiction, the appellant argues that the terms "obscene," "masochistic," and "sadistic" appearing in Section 1141 of the Penal Law are unconstitutionally vague (brief, pts. 1, 2, 5, 6).

However, it is absolutely clear that the term obscene is not vague [*Roth* v. *United States,* 357 U. S. 477 (1957); *People* v. *Finkelstein,* 9 N. Y. 2d 343 (1961)]. Indeed, in *Jacobellis* v. *Ohio* [84 S. Ct. 1676 (1964)] this Court recently reaffirmed the *Roth* definition of obscenity as constitutionally viable.

The contentions relating to the words "masochistic" and "sadistic," moreover, are clearly beside the point, for

the trial court found that the books violated the statute on the ground of obscenity alone (2166-76; 26 Misc. 2d 152). In this regard, it is quite clear, from their ordinary definition and their position in the statute, that the terms sadistic and masochistic merely describe sub-categories or specialized types of obscenity. Intermixed in the statute as they are with such other terms as lewd, lascivious, filthy, indecent and disgusting, these terms only itemize or detail the characteristics of obscenity. The trial court noted "That section uses descriptive adjectives quoted above in addition to the adjective obscene and it was held that all these adjectives are synonymous with obscene (*People* v. *Brooklyn News Co.*, 12 Misc. 2d 768, 771)."

Similarly, the dictionary definitions of the terms sadistic and masochistic reflect the sexually perverse elements this Court ascribed to obscenity in *Richmond County News* [9 N. Y. 2d 578 (1961)].

Indeed, the standard for obscenity in New York has been established by *People* v. *Richmond County News* [*supra*]. That case, which further restricts the definition of obscenity as propounded by the United States Supreme Court [see *Roth* v. *United States*, 354 U. S. 476 (1957)], held that obscenity under the New York statute applies solely to "hard-core pornography." Stating that the test of obscene material is the content "objectively appraised," the Court of Appeals promulgated the following guide lines for proper evaluation:

> "It (hard-core pornography) focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Law-

rence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'. (Murray, Literature and Censorship, 14 Books on Trial, 393, 394; see, also, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, [illegible]."

The Indiana University Institute for Sex Research in its book Sexual Behavior of the Human Female sheds some additional light on these aberrations:

"Some persons are aroused sexually when they think of situations that involve cruelty, whipping, flagellation, torture or other means deliberately adopted for the infliction of pain. More individuals are emotionally disturbed when they contemplate such sado-masochistic situations, and they may not recognize such a disturbance as sexual;" (at p. 676).

"That fewer of the females and more of the males had responded, appears again to have depended on the fact that reactions to sado-masochistic stories rely on fantasy" (at p. 677).

"Persons who respond only or primarily to objects which are remote from the sexual partner, or remote from the overt sexual activities with a partner are not rare in the population. This is particularly true of individuals who are erotically aroused by high heels, by boots, by corsets, by tight clothing, by long gloves, by whips or by other objects which suggest sado-masochistic relationships and which may have been associated with the individual's previous sexual activity."

In addition to the detailed and repulsive treatment of sado-masochism, fetishism, flagellation and bondage, the material is further infected with particularized incidents of both homosexual and heterosexual seduction. Rape, masturbation, and sodomy have not been overlooked. Even the must cursory review of the exhibits reveals that all the elements which characterize obscenity are over abundantly prevalent here. In short, the content of the material objectively appraised smacks of fantasy and unreality while focusing on what is sexually morbid and grossly perverse and thus unquestionably comes within the "hard-core" test of *Richmond County News,* and, therefore, within the *Roth* test.

Significantly, this Court in *Winters* v. *New York* [333 U. S. 507 (1948)] while declaring the predecessor of the present subdivision 2 of Section 1141 of the Penal Law unconstitutional because of vagueness, commented [333 U. S. 507, 520]:

> "To say that a state may not punish by such a vague statute [Penal Law, §1141, subd. 2] carries no implication that it may not punish circulation of objectionable matter, assuming that it is not protected by the provisions of the First Amendment, by the use of apt words to describe the prohibited publications. Section 1141, subsection 1 [involved in the present case] * * * is an example."

**(2) *Scienter* was Clearly Established.**

The appellant contends that there was no proof as to his knowledge of the character of the books (brief, pts. 3, 4). Such a claim, however, is completely absurd in view

of the overwhelming proof of *scienter* developed during the trial.

His instructions to the writers, to produce books "full of sex scenes and lesbian scenes * * * the sex had to be very strong, it had to be very rough, it had to be clearly spelled out * * * and there were spankings and sex scenes in an abnormal and irregular fashion" (1227-35), clearly demonstrate the appellant's awareness of the nature of the material he published.

Even as to those books which he did not publish, knowledge has also been established. The book jackets openly proclaim the material contained. Depicting in practically all cases the fantasy symbols of fetishism, spankings and sado-masochistic tortures, these jackets go far beyond those covers found on the "slick" magazines. In addition the titles reflected on the jackets in the main effectively inform the casual eye of the underlying obscenity. Other facts which indicate *scienter* are the exorbitant prices assessed for just a few pages of poorly bound material [see e.g. Exh. 1 (cardboard cover, staple bound, 50 pages for $10.00)]. Also indicating knowledge are notations on the exhibits announcing the books "privately printed," some in foreign countries, "for sophisticated collectors of the unusual."

Certainly, when all these elements are evaluated the conclusion that *scienter* has been overwhelmingly established is inescapable. The added claim that *scienter* was not an element of the crime under the New York statute is simply incorrect [*People* v. *Finkelstein,* 9 N.Y. 2d 342 (1961)].

**(3) The Evidence was Lawfully Seized.**

Finally, the contention that the books were seized in violation of the Fourth Amendment (brief, pt. 7) is wholly rebutted by the facts of their acquisition.

***Concerning the seizure at the warehouse***

The printer Levenberg, at first, maintained a "warehouse" for the books in Room 908 at 37 West 20th Street, the lease for which was in his name (550-5, 561, 562). Subsequently, Levenberg moved the books to the basement of that building (559-61). On cross-examination Levenberg testified that after conferring with his attorney, he had decided to surrender the books in the basement to the police; and that "The police never threatened me. It is a funny thing; they never threatened me" (902-14). It is thus quite clear that the books were obtained by the voluntary consent of Levenberg, and that, because of Levenberg's custody of the books and his relationship to the appellant as an accomplice, the books were properly admissible against the appellant under the Fourth Amendment [*United States* v. *Eldridge,* 302 F. 2d 463, 465 (4th Cir. 1962); *United States* v. *Sferas,* 210 F. 2d 69, 74 (7th Cir. 1954); *United States* v. *Goodman,* 190 F. Supp. 847, 850 (N. D. Ill. 1961)].

In the second place, even after Levenberg had agreed to surrender the books, the police with extreme caution obtained a search warrant for the warehouse. And it was pursuant to that warrant that the books were seized (398-404, 411-2). On the trial of the case, the defense reserved the right to examine police Lieutenant Dimler "as to the

adequacy of the search warrant" (405-6). The appellant later waived the reservation and stipulated to Dimler's testimony. It must be concluded then, that the appellant, who had the burden of proof in establishing the invalidity of the warrant, has totally failed in that regard. Moreover, by stipulating to Dimler's testimony he has waived the issue of sufficiency. And that issue, therefore, is unavailable to him on this appeal [see *People* v. *Wilson,* 16 App. Div. 2d 207 (1st Dept. 1962)].

***Concerning the seizure at the bookstores***

The balance of the books (Exhs. 43-72) were seized variously in The Publisher's Outlet Store, Midget Book Shop, and The Main Stem Book Store (429-49, 450-63, 487-92), premises with shelves and racks displaying books and magazines (431, 450, 457-8). At one point in cross-examination, Inspector Plansker—the seizing officer—indicated that the door to Publisher's Outlet was open (465-6). Nothing, however, in the record establishes that the seizing officers searched the premises prior to the seizure.

The officers clearly had the right—possessed by the general public—to enter the shops and examine the books displayed for sale. Having observed that the books in question were pornographic, the officers then had the right to seize them. Such seizure—based on observation alone —entailed no invasion of the right of privacy guaranteed by the Fourth Amendment and, consequently, was lawful [*Hester* v. *United States,* 265 U. S. 57 (1924); *United States* v. *Lee,* 274 U. S. 559 (1927); *United States* v. *Lefkowitz,* 285 U. S. 452, 465 (1932); *Ellison* v. *United States,* 206 F. 2d 476, 478 (D. C. Cir. 1953)].

The appellant's reliance on *Marcus* v. *Search Warrants* [367 U. S. 717 (1961)] in connection with the seizure of the books in the shops is without merit. In *Marcus*, the Supreme Court held that a search, pursuant to warrant, authorizing a search for material described only as obscene was a general search and, therefore, violative of the Fourth Amendment. That, however, is not the case here.

Moreover, it is apparent that the seizure of the obscene books at Publisher's Outlet were incident to lawful arrests. The police went to the book store and found it open for business. They arrested Cosky and two other individuals and seized over two hundred obscene books from the store which had been described as having shelves and racks displaying magazines. Seizures incident to a lawful arrest are, of course, lawful [*People* v. *Loria*, 10 N. Y. 2d 360 (1961)].

## Conclusion

***We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented for the decision of this Court.***

Respectfully submitted,

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*Of Counsel*

February, 1965

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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No. 42

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EDWARD MISHKIN, *Appellant*

v.

NEW YORK, *Appellee*

---

BRIEF OF

MARSHALL COHEN; JASON EPSTEIN (Random House); PAUL GOODMAN; WARREN HINCKLE (Ramparts); ERIC LARRABEE; WALTER MINTON (G. P. Putnam's Sons); NORMAN PODHORETZ (Commentary); RICHARD POIRIER (Partisan Review); BARNEY ROSSET (Grove Press); ROBERT SILVERS (The New York Review of Books); and WILLIAM STYRON,

AS AMICI CURIAE

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## INDEX


| | Page |
|---|---|
| Interest of Amici Curiae and Preliminary Statement.. | 1 |
| Argument ..... | 4 |
| A. Under the Developing Doctrine of This Court In Obscenity Cases, Suppressions and Convictions Should Be Declared Invalid Where There Is No Adversary Judicial Hearing Prior To Seizure of the Books and No Showing of the Elements Said To Constitute the Crime of Obscene Publication ..... | 5 |
| B. The Court Should Fashion a Bold Clear Rule To Govern Freedom of Expression In Printed and Graphic Forms Which Will Put An End To All Censorship of the Printed Word Or Image, Regardless of Sexual Connotation... | 8 |
| Conclusion ..... | 14 |


## CITATIONS

CASES:


| | |
|---|---|
| Attorney General v. Book Named Memoires of a Woman of Pleasure, — N.E. 2d — (April 22, 1965) | 9 |
| Attorney General v. Book Names "Tropic of Cancer", 184 N.E. 2d 328 ..... | 9 |
| Freedman v. Maryland, 380 U.S. 51 ..... | 6, 8 |
| Grove Press v. Gerstein, 378 U.S. 577 ..... | 6 |
| Jacobellis v. Ohio, 378 U.S. 184 ..... | 6, 8, 13 |
| Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495..... | 12 |
| Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 ..... | 6 |
| Larkin v. G. P. Putnam's Sons, 200 N.E. 2d 760 .... | 9 |
| Manual Enterprises v. Day, 370 U.S. 478 ..... | 6, 8 |
| Mapp v. Ohio, 367 U.S. 643 ..... | 6 |
| Marcus v. Search Warrants, 367 U.S. 717 ..... | 6 |
| People v. Fritch, 192 N.E. 2d 713 ..... | 9 |
| Quantity of Books v. Kansas, 378 U.S. 205 ..... | 6 |

Page

Roth v. United States, 354 U.S. 476 .....3, 6, 7, 8, 9
Smith v. California, 361 U.S. 147 ..... 6
Speiser v. Randall, 357 U.S. 513 ..... 8
United States v. Irving Klaw, — F. 2d — (C.A. 2d, July 15, 1965) ..... 7, 8

OTHER AUTHORITIES

Faulkner, Sanctuary (Random House, The Modern Library Edition, 1931) at page v ..... 13
LaBarr, Obscenity: An Anthropological Appraisal, 20 Law & Contemp. Prob. 536 ..... 11
Krafft-Ebing, Psychopathia Sexualis (Paperback Library, 1965) at page viii ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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No. 49

---

EDWARD MISHKIN, *Appellant*

v.

NEW YORK, *Appellee*

---

**BRIEF OF**

**MARSHALL COHEN; JASON EPSTEIN (Random House); PAUL GOODMAN; WARREN HINCKLE (Ramparts); ERIC LARRABEE; WALTER MINTON (G. P. Putnam's Sons); NORMAN PODHORETZ (Commentary); RICHARD POIRIER (Partisan Review); BARNEY ROSSET (Grove Press); ROBERT SILVERS (The New York Review of Books); and WILLIAM STYRON.**

**AS AMICI CURIAE**

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## INTEREST OF AMICI CURIAE AND PRELIMINARY STATEMENT *

*Amici* are individuals personally and professionally concerned with the current conflict between those who seek greater freedom of expression, in printed and graphic forms, and those who seek to limit these forms

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* This brief is filed with the consent of both parties.

of expression to asserted norms of decency and morality. Our personal concern stems from our participation as individuals in the quality of American life and society. Our professional involvement derives from our day-by-day work in the creation, criticism and distribution of books, some of which from time to time breach putative norms of decency and morality.

At least since the days of Anthony Comstock, those in this country who would limit expression have been able to enlist on their side the police power of local, state and federal government agencies. Insofar as exercises of that power have been upheld by the state and federal courts of the nation, the judiciary too has been involved in the repression of images and ideas expressed in printed and graphic forms. We feel it is a Constitutional error of major proportions for this Court to continue to tolerate censorship activity—civil or criminal, federal, state or local. We believe the Court should once and for all outlaw all governmental policing of the images and ideas disseminated among adults in book and any other printed or graphic form.

*Amici* share the belief of those who say that the elimination of all censorship will have an effect upon the nation's attitudes and behavior, but we believe the net effect can work only to the good. Censorship breeds its own evil: by forbidding natural imaginative explorations in the world of sex, it foments an unnatural prurient interest in sex. So long as censorship exists, it is futile to imagine that commercial traders upon prurient interests can be made not to exist.

Prosecutions for obscenity have always been a major device for the censorship of literature and art in this country. Reputable as well as disreputable publishers,

booksellers, writers, and artists have been subjected to threats of arrest, arrest, prosecution, conviction, fine and imprisonment for their involvement in the production or dissemination of books and other printed material which violate putative norms. No one involved in the creation or distribution of American literature and art has been unaffected by censorship. So long as any censorship of books is permitted by *Roth,* no one can be sure that if today the police power gets invoked against the publisher of "The Dance With The Dominant Whip" it will not tomorrow be used against the paper-back distributor of "The American Dream". For the *Roth* doctrine, even as modified to this day, alleviates censorship only to a degree: persons working with material without importance get no license to publish and distribute freely, while those dealing with important literature can never be sure local law enforcement officials will entirely agree. The road from arrest and conviction to redress by this Court is arduous, expensive and long.

Moreover, freedom, in our democracy, should be uniform as well as full, and the administration of justice needs to be even-handed. Though *amici* may dislike, even despise, the content of some or many works which are being challenged as "obscene", those who produce them and those who read them were given as much Constitutional *right* to do so as those who produce and read works which are not challenged.

## ARGUMENT

*Amici* have neither seen nor read the printed matter involved in this case, considering its actual content immaterial to a correct resolution of the larger issues posed by the case.* It is assumed, however, that the books involved are more-or-less as described by New York in its *Motion To Dismiss:* that "the covers of about nineteen of the books display women being whipped, beaten, tortured or abused"; that "practically all the book jackets depict symbols associated with fetishism"; that "one jacket depicts a lesbian seduction scene"; that "numerous exhibits display partially clothed or nude women whose breasts or buttocks are greatly exaggerated"; that in each case "the jackets relate to the subject matter of the book"; that the dominant theme of many of the books is "devoted to depicting pictorially and verbally innumerable scenes in which individuals are being tortured in varied and fantastic ways"; that many of the books "deal in great detail with whippings, beatings and spankings"; that "the victims, moreover, although portrayed in agony, experience pleasure"; that many of the books "present multiple and particularized incidents of sexual seduction (homosexual and heterosexual), sodomy, rape and masturbation".

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* *Amici* understand that the prosecution and conviction of Mishkin proceeded on the thoery that the "sadistic" and "masochistic" attributes of the material were "sub-categories or specialized types of obscenity," and that "intermixed in the statute as they are with such other terms as lewd, lascivious, filthy, indecent and disgusting, these terms only itemize or detail the characteristics of obscenity" which it is the purpose of the statute (Section 1141 of the New York Penal Code) to proscribe. See *Motion to Dismiss* herein at pages 10-11.

*Amici* may safely state their belief that the books thus described and suppressed, and for whose publication Appellant Mishkin was sentenced to jail, in all likelihood possess no recognizeable literary or artistic value. They are doubtless vulgar and in very bad taste, and deliberately designed to appeal to the "prurient interests" of some persons, perhaps even of average persons. It also seems likely that these works are offensive to putative community standards of decency, and that they convey ideas, if any, which are "without redeeming social importance". Nevertheless, *amici* submit these books cannot be suppressed, and Appellant Mishkin cannot be punished for preparing and publishing them, consistently with the Constitutional guarantees of freedom of expression.

**A. Under the Developing Doctrine of This Court In Obscenity Cases, Suppressions and Convictions Should Be Declared Invalid Where There Is No Adversary Judicial Hearing Prior To Seizure of the Books and No Showing of the Elements Said To Constitute the Crime of Obscene Publication**

(1) Even under New York's statement of the facts of the case, it appears that the books, upon which Appellant's conviction was based, were seized and suppressed without the type of prior, adversary hearing on the question of 'obscenity' which this Court has declared necessary to support a valid search or seizure. The State says: (at page 16 of its *Motion to Dismiss*) "The officers clearly had the right—possessed by the general public—to enter the shops and examine the books displayed for sale. Having observed that the books in question were pornographic, the officers then had the right to seize them." *Amici* submit that if New York is correct then no bookstore, no publisher's office, no public library is secure from having its shelves rifled by any policeman, any detective, perhaps

even any private citizen (schooled in "citizen arrest"), who enters the premises, opens a book, and merely "observes" what he takes to be obscene. From such a rule of Constitutional seizure not even acknowledged masterpieces of literature or art would be safe. But we believe New York cannot be correct and that, not being conditioned upon a prior judicial adversary hearing, the seizures of the books in question—whether obscene or not—were unconstitutional. *Mapp* v. *Ohio,* 367 US 643; *Marcus* v. *Search Warrants,* 367 US 717; *A Quantity of Books* v. *Kansas,* 378 US 205; *Freedman* v. *Maryland,* 380 US 51.

(2) Even were the books seized in this case properly before the court, no conviction for the possession or publication of allegedly "obscene" literature should be permitted to stand that rests upon the submission in evidence of the literature alone. Before a book may be banned, or its creator, publisher or distributor punished, the prosecuting authority should be obliged to prove not only the existence of *scienter,* as required by *Smith* v. *California,* 361 US 147, but also the other elements of the crime which this Court described in *Roth* v. *United States,* 354 US 476, and the cases which followed. As we understand the pertinent decisions, a book cannot be held obscene if it involves "material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any form of social importance." *Jacobellis* v. *Ohio,* 378 US 184; *Grove Press* v. *Gerstein,* 378 US 577; *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 US 684; *Roth* v. *United States, supra.* In addition, as the Court pointed out in *Manual Enterprises* v. *Day,* 370 US 478, a showing must also be made that the material has "patent offensiveness"—a quality which "no less than 'prurient interest' is essential to a valid determination

of obscenity . . ." In the case at hand, no proof appears to have been adduced by New York that the books in fact appealed to the "prurient" or other interest of anyone in the community, and no proof was adduced that the books went "beyond the pale of contemporary notions of rudimentary decency," local or national.

We do not believe that the *Roth* doctrine lays down any objective standard by which the average policeman, prosecutor, juror or judge can reliably distinguish "obscene" from constitutionally protected material. We do not believe *Roth* lays down any standard by which the average writer, critic, publisher or distributor can safely distinguish between material pointing to perdition and that having sanctity. But if the Court insists that *Roth* be applied as though it embodied an objective standard, which poets and policemen alike should be able to apply in their allotted tasks, then the elements involved should be capable of proof. If literature can, in fact, appeal to the prurient interest of persons, or if it can be patently offensive to some asserted local or national standard of decency, the allegations must be matters of proof just as are the elements that make up a case of criminal fraud or negligence. See: *United States* v. *Irving Klaw,* — F. 2d — (C.A. 2d, July 15, 1965.) Proof that the works are tasteless or disgusting or degrading or sickening, should, of course, be irrelevant. The trial judge below evidently was offered no proof of obscenity (nor of "sadism" or "masochism"); upon examining the books, he found them "sickening"; and on the basis of this response, he concluded that the books were legally obscene. Appellant Mishkin admits the "dominant theme" of his books was "erotic" but claims they are "at worst . . . trashy or vulgar . . . they probably are

a bore." We suspect he is correct. If so, they obviously cannot be obscene. Even if the books were proven to have been sickening, that is not enough to make them obscene. *United States* v. *Irving Klaw, supra.* As this Court has already once recognized with respect to magazines it found "dismally unpleasant, uncouth and tawdry . . ."—such qualities are "not enough to make them obscene." *Manual Enterprises* v. *Day, supra.*

If the Court determines to let *Roth* stand any longer, *amici* urge the Court to make clear to prosecuting and adjudicating authorities that no conviction for the crime of publishing obscenity will stand where the prosecutor rests his case upon the presentation to the Court of the "accused" literature alone. As though a state could validly convict a man of murder by having him sit in the dock. "Where the transcendent value of speech is involved, due process certainly requires . . . that the state bear the burden of persuasion to show that the appellants engaged in criminal speech." *Speiser* v. *Randall,* 357 US 513; *Freedman* v. *Maryland, supra.* The burden was not lifted, much less carried, by New York in this case. If it is in the nature of the *Roth* test that the burden of proof involved is incapable of being borne, then *Roth* should be abandoned, or all convictions under it forgone.

**B. The Court Should Fashion a Bold Clear Rule To Govern Freedom of Expression In Printed and Graphic Forms Which Will Put An End To All Censorship of the Printed Word Or Image, Regardless of Sexual Connotation**

The doctrine announced in *Roth,* even as amplified in *Manual Enterprises* and *Jacobellis,* has not eliminated literary censorship from the American scene. Yet as Justices Douglas and Black have so long in-

sisted, no less is asked by the First and Fourteenth Amendments. Although worthwhile books are being published today which could not have been published ten years ago without certain seizure, arrest, prosecution and conviction—what about the books of tomorrow? At least one high state court seeking conscientiously to apply the *Roth* doctrine, one day found that a book having obvious artistic importance was protected by the Constitution and not obscene, but on another, more recent day, found that a book of purportedly negligible literary and historic importance was unprotected by the Constitution, and was obscene* Exactly opposite conclusions, concerning each of the books involved, were reached by the highest court of another state, that in which the instant case arose.** Such decisions, even more than those of lower courts, expose the perhaps irreparable weakness of the *Roth* doctrine.

This Court has itself recognized that the experience since *Roth* has not entirely vindicated the approach to obscenity taken there, and that any different approach which did no more than substitute notions about "hardcore pornography" for notions about "obscenity" would likely enjoy no better fate. The Court has found itself obliged to exercise "its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case," without, however, assuming the function of Super-Censor. But

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* Consult: *Attorney General* v. *Book Named "Tropic of Cancer,"* 184 N.E. 2d. 328 and *Attorney General* v. *Book Named "Memoires of a Woman of Pleasure"*, — N.E. 2d — (April 22, 1965).

** Consult: *People* v. *Fritch*, 192 N.E. 2d 713; *Larkin* v. *G. P. Putnam's Sons*, 200 N.E. 2d 760.

*amici* fear that in the absence of a bold, clear rule, liberating all printed and graphic expression, the court will continue to be confronted by confused or recalcitrant prosecuting and judicial officials and, as the Chief Justice observed in *Jacobellis,* cases coming to it "in ever-increasing numbers."

We understand those who, like the Chief Justice, see in obscenity cases the need "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." We recognize that "although the Federal Government and virtually every State has had laws proscribing obscenity since the Union was formed, and although this Court has recently decided that obscenity is not within the protection of the First Amendment, neither courts nor legislatures have been able to evolve a truly satisfactory definition of obscenity." We cannot, however, agree that these propositions warrant the Court to conclude that there must be at hand, or just out of hand, some such satisfactory definition—"a rule of reason in this as in other areas of the law." We cannot agree, that is, that all the *Roth* test needs is a little more gloss.

It cannot be often enough remembered that what is obscene to one person may be the laughter of genius to another; that there is, and can be, no community agreement on such things; that what is prurient to an Arkansas housewife may be only a bad joke to a New York executive; and that, depending upon a variety of psychological and cultural factors, persons might have their "prurient interest" aroused not only by "spike type heels, leather boots, tight clothing, gloves, whips,

ropes and belts. . . ." (*Motion To Dismiss* herein at page 9), but even by "the pronounced and regular rhythms of the Sousa march, 'The Stars and Stripes Forever', played by a Marine band. . . ." (La Barre, "Obscenity: An Anthropological Appraisal", in 20 Law & Contem. Prob. 536). Yet, free speech and free press must not, in this country, be geared to a mercurial standard.

In seeking to lend support to our states' and the nation's natural aspirations to compose a decent as well as a good and honorable society, the Court or some of its members have on occasion looked to the prerogative of the State or Nation to "maintain a decent society" or "its moral fiber," and to the "social interest in order and morality." *Amici* submit, however, that it is no proper role of the judicial branch to supervise, on a local or national basis, the maintenance of "decency" or "morality" in the communication of sexual ideas, just as it would be no proper role for the courts to insure that the people of New York or Texas or Hawaii or all America refrained from communicating patently offensive or sickening political ideas. It may be true, as a few of this Court's earlier cases and some noted legal commentators have suggested, that ours like most societies may enlist a police power to enforce, in certain situations, the most elemental forms of decency. Thus, blunt scenes of sexual love-making on the day-time television screen, graffiti on highway billboards, indecent public exhibitions of the person, and obscene utterances in public conveyances, might be outlawed without much danger to, or undue restraint upon, freedom of expression. These contain elements of coercion upon those who may object to obscenity and whose right to reject such material

should be protected. At the same time, persons having no objection to obscenity must retain a right to be protected from coercion of the other side. There is no coercion involved in the reading of a book, however vile, or the attending of a motion picture film, however prurient. Our government, in this area, stays within its Constitutional bounds when it protects persons from public nuisance and shocks from which they can have no immediate escape or recourse. It commits unconstitutional acts when it attempts more than this. There is a Censor's world of difference between the police power necessary to enforce rudimentary public decency and the network of municipal, state and federal, police, administrative, and judicial systems required to confine the sexual images and ideas presented in books and other forms to asserted norms of decency.

In our view, federal, state and local law enforcement agencies were given no more scope, under the Constitution, to regulate the sexual morality or decency of the images and ideas communicated among the citizens, than they were to regulate their political or religious morality or decency. Accordingly, this Court need no more pause to strike down statutes or applications of statutes which punish persons for publishing putatively "obscene" books, than it hesitated to strike down a statute forbidding the exhibition of allegedly "sacrilegious" films. *Joseph Burstyn, Inc.* v. *Wilson,* 343 US 495.

*Amici* are mindful that evidence was introduced to show that Appellant Mishkin hired "writers" and "artists" to produce the books in question in accordance with what might seem to be a perverse formula, that is, there was testimony that he instructed them "to deal with sex in an unusual manner," to create

scenes "in which women were making love with women" and "men making love to men, and there were spankings and scenes—sex in an abnormal and irregular fashion," and to emphasize "beating and fetishism." While *amici* have no wish to applaud such commercial exploitation of sexual interests as may have been involved here, they do not understand how the Constitution discriminates between commercial and non-commercial exploitations, nor even between entertaining exploitations and instructive explorations. Between Mishkin and Krafft-Ebing * there may exist a comfortable divide, but what about Faulkner? **

It is not, we hope, only self-interest which urges us to question a suggestion in *Jacobellis* that despite all the problems presented by the *Roth* doctrine, it should continue to be enforced in order that "those who profit from the commercial exploitation of obscenity" may not "continue to ply their trade unmolested." For we fear such suggestions may be interpreted not as an affirmation of the duty of law-enforcement officials to cleanly apply due criminal process against any and all persons believed to have committed validly-enacted, well-defined crimes, but as an invitation to such officials to harass, intimidate and persecute, through the ready devices of the criminal law, persons financially ill-equipped to defend the freedom of a literature itself

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* But see Krafft-Ebing's "Preface to the Twelfth Edition" of *Psychopathia Sexualis:* "Its commercial success is the best proof that large numbers of unfortunate people find in its pages instruction and relief in the frequently enigmatical manifestations of sexual life."

** See Faulkner's "Introduction" to *Sanctuary:* "This book was written three years ago. To me it is a cheap idea, because it was deliberately conceived to make money."

ill-designed to attract to its side persons who are appreciative of, and prepared to argue for, its importance. It is a dangerous idea that the molesting of disreputable publishers may be a proper activity of government. Such activity seems to us a grave breach of the constitutional guaranties both of freedom of the press and equal protection of the laws.

## CONCLUSION

Wherefore, it is respectfully urged that the judgments of the Courts below in convicting and upholding the conviction of Appellant Mishkin, be set aside.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1965

No. 49

EDWARD MISHKIN,

Appellant,

*against*

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## BRIEF FOR THE APPELLANT

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## INDEX


| | PAGE |
|---|---|
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statute Involved | 3 |
| Statement | 3 |
| Summary of Argument | 4 |

ARGUMENT:

| | |
|---|---|
| I—Section 1141 Penal Law insofar as it forbids the publishing and distribution of books which are sadistic or masochistic impairs freedom of publication | 7 |
| II—"Sadism" and "masochism" are unconstitutionally vague | 9 |
| III—Because the theories under which defendant was convicted are diverse a reversal must follow if any one is held invalid | 12 |
| IV—There is no proof that the defendant knew that the books were obscene or sadistic-masochistic | 13 |
| V—The books are not obscene within the meaning of the Fourteenth Amendment | 15 |
| VI—Section 1141 Penal Law suffers from vagueness insofar as obscenity lacks definition | 18 |
| VII—The books were seized in violation of the First Amendment and the Fourth Amendment | 21 |
| Conclusion | 24 |
| Appendix A | 26 |
| Appendix B | 29 |

## Cases Cited


| | PAGE |
|---|---|
| A Quantity of Books v. Kansas, 378 U. S. 205 | 18, 22 |
| Bantam Books v. Sullivan, 372 U. S. 58 | 24 |
| Boyd v. United States, 116 U. S. 616 | 24 |
| Grove Press v. Gerstein, 378 U. S. 577 | 9, 18 |
| Jacobellis v. Ohio, 378 U. S. 184 | 18 |
| Jones v. United States, 357 U. S. 493 | 22 |
| Kingsley Books v. Brown, 354 U. S. 436 | 23 |
| Kingsley International Pictures Corp., 360 U. S. 684 | 9 |
| Kremen v. United States, 353 U. S. 346 | 22 |
| Lanzetta v. New Jersey, 306 U. S. 451 | 12 |
| Manuel Enterprises v. Day, 370 U. S. 478 | 9, 16 |
| Mapp v. Ohio, 367 U. S. 643 | 21 |
| Marcus v. Search Warrants, 367 U. S. 717 | 22 |
| One, Inc. v. Oelsen, 355 U. S. 371 | 9, 18 |
| People v. Brooklyn News Co., 12 Misc. 2d 768 | 11 |
| People v. Coffey, 11 N. Y. 2d 142 | 22 |
| People v. Defore, 242 N. Y. 13 | 21 |
| People v. Finkelstein, 9 N. Y. 27, 342 | 14 |
| People v. Loria, 10 N. Y. 2d 368 | 22 |
| People v. Richmond County News, 9 N. Y. 2d 578 | 20 |
| Roth v. United States, 345 U. S. 476 | 9, 14, 18 |
| Search Warrants of Property, etc., 367 U. S. 717 | 22 |
| Smith v. California, 361 U. S. 147 | 9, 13 |
| Stanford, Jr. v. Texas, —— U. S. ——, January 18, 1965; 13 L. ed. 2d 431 | 23 |

PAGE

Stromberg v. California, 283 U. S. 359, 368 ..... 13

Times Film Corp. v. The City of Chicago, 355 U. S. 835 ..... 18

Trailins v. Gerstein, 378 U. S. 576 ..... 9, 18

United States v. Klaw, decided July 15, 1965 ....16, 20, 29

Winters v. New York, 333 U. S. 507 .....1, 5, 9, 19

Yates v. United States, 354 U. S. 298 ..... 9

STATUTES

28 U.S.C. § 1287 ..... 1

Penal Code:

Section 1141 .....3, 6, 7, 18, 26

United States Constitution:

Fourteenth Amendment ..... 15

First Amendment ..... 21

Fourth Amendment ..... 21

AUTHORITIES

Lockhart and McClure, Censorship of Obscenity .... 18

The Developing Constitutional Standrads, 45 Minn. L. Rev. 5, 114-115 ..... 18

Emerson, "Toward a General Theory of the First Amendment," 72 Yale L. J. 877, 938 ..... 18

In the

# Supreme Court of the United States

OCTOBER TERM 1965

No. 49

Edward Mishkin,

Appellant,

*against*

The State of New York,

Appellee.

## BRIEF FOR THE APPELLANT

The Court of Appeals did not write an opinion. The Appellate Division did not render an opinion on the subject matter of this appeal (although it wrote with respect to another phase, in 17 A. D. 2d 243). The trial court wrote an opinion reported in 26 Misc. 2d 152, and is also found at page 720 of the Transcript of the Record.

### Jurisdiction

(1) The jurisdiction of this court is conferred by 28 U.S.C. § 1287(2). The following decision sustains the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York,* 333 U. S. 507.

(ii) The judgment of affirmance by the New York Court of Appeals was made and entered on December 3, 1964. Notice of Appeal to this court was filed on December 16, 1964 in the Criminal Court of the City of New York, the court possessed of the record.

(iii) The Court of Appeals amended its Remittitur to read as follows:

> "Defendant argued that Section 1141 of the Penal Law of the State of New York is invalid under the Constitution of the United States for proscribing sadistic and masochistic publications in general and as applied to the publications in this case in particular and, also, for vagueness; and, further, that his rights under the Fourth and Fourteenth Amendments to the Constitution were violated respectively, by unlawful searches and seizures and by his conviction without proof that he was aware of the obscene nature of the publications. This Court held that Section 1141 of the Penal Law was valid and that there was no violation of the rights of the defendant either under the Constitution of the United States or the Amendments thereto." Page 749 Transcript.

(iv) Probable jurisdiction was noted on April 5, 1965.

## Questions Presented

(1) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States in that it proscribes publications that are sadistic and masochistic?

(2) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of sadism and masochism?

(3) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of obscenity?

(4) Was Section 1141 of the Penal Law unconstitutionally applied to the publications in this case?

(5) Are the publications obscene within the construction of the Fourteenth Amendment to the Constitution of the United States?

(6) Was the Fourteenth Amendment violated by the conviction of the appellant without proof that he knew the obscene nature of the contents of the publications?

(7) Were the searches of and seizures at the appellant's premises in violation of the Fourth Amendment to the Constitution of the United States?

## Statute Involved

Section 1141 of the Penal Law, in pertinent part, reads as follows:

> "1. A person who * * * has in his possession with intent to sell, lend, distribute * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book * * * or prints, utters, publishes, or in any manner manufactures, or prepares any such book * * * or who,
>
> "2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them.
> "Is guilty of a misdemeanor * * *."

(The full statute is set forth in Appendix A.)

## Statement

Permission was granted to appeal to the Court of Appeals by a judge of that court, who certified that there were questions involved which ought to be reviewed by that court. Thereafter, that court affirmed the conviction. The conviction carries a sentence of three (3) consecutive years of imprisonment and fines totalling $12,000.

The pertinent charges against appellant are 159 counts classified as follows:

Counts 1 through 62 deal with unlawful possessing with intent to sell certain "obscene, lewd, lascivious, filthy, inde-

cent, sadistic, masochistic and disgusting" books,—all adjectives stated conjunctively.

Counts 63 through 110 deal with unlawful publishing the aforesaid books,—characterized conjunctively.

Counts 111 through 159 charge him with unlawfully hiring others to prepare said books,—also characterized conjunctively.

The record does not show that appellant had knowledge that the books offended the statute, even if he does show that he knew they were erotic. And if he is to be assumed to have known, constructively, there is also lacking any proof in the record that appellant knew the character of the books whether they were obscene, sadistic, or masochistic, as charged by the Information.

He was found guilty of 140 of the counts (Transcript 699).

## Summary of Argument

The appellant was charged with either possessing or publishing or hiring others to prepare for publication about 72 titles of books which are alleged to be obscene, sadistic and masochistic under a statute which forbids either of such types of publications, and the statute is stated *disjunctively.*

The appellant challenges the validity of the statute insofar as it proscribes publications that deal with sadism and masochism, on the ground that the Constitution excludes only obscene publications from its protection. By the history of the amendment of the statute in 1956 it cannot be argued that sadism and masochism are ~~not~~ synonyms for the word obscenity. Likewise, it cannot be presumed that the legislature merely provided a superfluous tautology and did an idle act by adding nothing to the existing obscenity law. At the commencement of this prosecution there was no construction by the highest court of the state

nor is there now that the words are synonymous. Nor was there any construction to that effect by any court in the state at the time the prosecution was commenced. To attempt in this prosecution to construe the statute in that manner for he first time, to catch this appellant within such scope would deny him due process of law.

The statute in prohibiting publications dealing with sadism and masochism is also invalid in that it is indefinite. Sadism and masochism in their meaning to ordinary men, mean, the pleasures derived from the infliction of pain, and the pleasure derived from the reception of pain, respectively. Such attitudes in literature are ordinary and widespread. Literature is full of painful situations in which the actor derives pleasure from them. And the enjoyment of sacrifice, asceticism, and hardship, described in literature, is also common depiction. Since this is the common application of the words in their broad range they would fall within the condemnation of *Winters* v. *New York,* 333 U. S. 507.

Nor are the books in question obscene within the interpretation given to that word by this court. These books or at least most of them (their character was not individually separated by the trial court or the prosecution, but treated as a lot) were alleged by the prosecution to be "bondage" type of writings. As such they may be offensive and vulgar to the average person, but not prurient. The trial court characterized them as "sickening". One would hardly associate an aphrodisiac with what sickens. The Court of Appeals of the Second Circuit in *Klaw* had occasion only in July of 1965 to compendiously discuss these bondage books. In the belief that its opinion, not yet reported, would be valuable, it is set forth here in full in Appendix B. The conclusion of that court is consistent with the argument made here that this type of literature may have a special appeal as in the material in the *Manual Enterprises* case, and cannot on its face, without more, be condemned as obscene.

Mishkin also argues that there is no proof that he knew that the character of the books violated the statute. He may have known that they dealt with sex or were erotic, but nothing in the record shows that he had knowledge they were of the character the law forbade.

Appellant also contends that the construction of Section 1141 of the Penal Law is invalid on the ground that it is vague and that the construction put on the term obscenity by this court does not clarify what obscenity really means, at least as applied to the books in this case.

Another contention of appellant is that the seizures of the many thousands of copies of many titles involved in this case were in violation of appellant's rights as protected by the Fourth Amendment. Seizures were made under alleged authority of a warrant at one place where 17,000 volumes were seized. This was before the *Mapp* case was decided by this court. The volumes so seized were admitted in evidence over objection, subject to the production by the prosecution of the warrant and of the officer in charge. They were not produced. At that time the law of New York allowed illegally seized evidence to be admitted. Seizures of thousands of volumes were also made in those bookstores allegedly owned or controlled by appellant. The appellee admitted that no warrant for same was procured. Appellee contended that since these were bookstores open to the public, police officers could go into a store at will and make seizures, because the books would fall under contraband. Appellant contends that to permit a police officer to enter, at random at any time, into an open bookstore and haul away thousands of books from the shelves which he believes are contraband or which he believes violate the statute, makes a mockery not only of the Fourth Amendment but also of the First. Insofar as the courts below did not condemn these abuses, they failed to heed the many decisions of this court.

## ARGUMENT

### I

**Section 1141 Penal Law insofar as it forbids the publishing and distribution of books which are sadistic or masochistic impairs freedom of publication.**

The defendant was prosecuted under the statute which makes criminal the possession, etc. of any "obscene, lewd, lascivious, filthy, indecent, *sadistic, masochistic* or disgusting book".

The words "sadistic" and "masochistic" were added to the statute to separate that type of publication from "obscene" publications. That "sadism" and "masochism" are not synonymous with "obscenity" is demonstrated in these ways:

1. The statute reads in the disjunctive.

2. The history of the law shows that by the New York laws of 1956, Chap. 681, the legislature added the words "sadism" and "masochism" to the existing obscenity statute because the statute had been construed to exclude that type of publication.

Before the words were added to the statute in 1956, the courts construed Section 1141 so as to exclude sadism and masochism. The Commissioner of Police testified:

> ". . . Various decisions in the criminal courts have held that the prohibition of § 1141 of the Penal Law do not include books of Sadism and Masochism.
>
> One of the answers to this problem lies in the inclusion of the words 'Sadism' and 'Masochism' within the provisions of Section 1141 of the Penal Law." New York Legislative Document, No. 32, Vol. 3, 1956, p. 58.

The legislature in reporting on the law said:

> "This bill amends Subdivision 1 of the general obscenity statute 1141 of the Penal Law by adding a prohibition against the publication, distribution or sale of sadistic or masochistic publications." (Italics supplied) New York Legislative Annual, 1956, p. 47.

3. If "sadism" is synonymous with "obscenity", then it is superfluous and confuses. But in the light of the legislative history, it is a distinct offense.

4. The People, appellee, recognized the distinction at the trial when the prosecutor stated as follows:

> "Mr. Stein: Just one word by way of the kind of evidence we hope to adduce here at the trial. I want to call the Court's attention that the *better number* of books involved here are not the normal types of volumes which are prosecuted in pornography cases. They fall within the specific provisions of 1141 dealing with sadism and masochism.
>
> There are, in addition, a great quantity of books which fall within the normal provisions of the pornography section of the Penal Law." (Emphasis supplied)

The statute violates the freedom of speech protections of the Fourteenth Amendment because it prohibits the publication and distribution of literature which is protected. This court has excluded from protection literature which is denominated as obscene. This court also has made clear that other literature may not be restricted.

In *Smith* v. *California,* 361 U. S. 147, the court said, "Our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene." This was a consistent development from *Roth* v. *United States,* 345 U. S. 476 and *Kingsley International Pictures Corp.,* 360 U. S. 684. In the latter case a motion

picture presented the theme that adultery was acceptable conduct. Yet the restraint upon the distribution of the film was condemned by this court.

Since it is obscene publications only that are excluded from the protection of the Constitution, it follows that sadistic or masochistic books remain protected. See also, *Yates* v. *United States,* 354 U. S. 298; *Grove Press* v. *Gerstein,* 378 U. S. 577; *Trailins* v. *Gerstein,* 378 U. S. 576; *One, Inc.* v. *Oelsen,* 355 U. S. 371; *Manual Enterprises* v. *Day,* 370 U. S. 478. In *Manual Enterprises* this court said:

> "Whether 'hard-core' pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question, taken as a whole, cannot under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency."

## II

**"Sadism" and "masochism" are unconstitutionally vague.**

In *Winters* v. *New York,* 333 U. S. 507, this court struck down a part of the same obscenity statute which was directed against publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime". It is impossible to distinguish sadism or masochism from the vagueness in *Winters.* In both instances the ambit of the statute is so wide that it is catchall for publications of all kinds. Sadism and masochism in general refer to acts of cruelty which afford pleasure to the actor in one case, and pleasure to the receiver in the other. That cruelty manifests itself in human conduct is an idle statement. Depiction of the gratification by the tormentor is as commonplace as cruelty itself. The bloodletting in Shakespeare: the cruelties and

revenges in *King Lear,* as one example, depicting the joys to the avenger could be condemned under this statute. So would the gory cruelties in the Bible and in Greek literature. Our contemporary "westerns" would suffer like condemnation.

A ready example is found in the classic, "Two Years Before The Mast" by Richard H. Dana, Jr., Chapter XV, when a sailor asked the captain of a ship why he flogged sailors, the captain replied,

> "If you want to know what I flog you for, I'll tell you. It's because I like to do it!—because I like to do it—It suits me! That's what I do it for!"

The words sadism and masochism are as subjective as the phenomena they attempt to define. They are all-embracing.

In the absence of any construction of the words their common meanings must be accepted in the broad sense of gratification of any kind—whether sexual or otherwise—through cruelty or injury of another person. Under the circumstances, the scope of the statute, broad beyond comprehension as to what is forbidden, the statute falls within these words of *Winters* (p. 519):

> "The Statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes'. Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."

The Court of Appeals did not construe the statute in this case nor in any other case either prior to this one, or subsequent thereto. The trial court stated (R. 722) that all the adjectives were synonymous with "obscene", citing a lower court case of coordinate jurisdiction, *People* v. *Brooklyn News Co.,* 12 Misc. 2d 768. Examination of that case discloses that the court did not construe the words sadism and masochism to be synonymous with "obscenity". Even if it had it would lack the authority of a construction by the highest court of the state from which this appeal is taken. Therefore, there is no construction which this court could follow, with the same force and effect as if the legislature had so stated it. See *Winters* where the highest court did make a construction, yet this court found it inadequate as a constitutional protection.

The construction of the statute by the trial court, even if binding on this court is deficient in several respects. It is difficult to conclude in the light of the history of the legislation that the words sadistic and masochistic are synonymous with obscenity. If they were the legislature would not have gone to the trouble in 1956 to add the two words when the word obscene and its allies had been on the books for decades. Nor do the words themselves, as found in a dictionary mean the same as "obscene".

Moreover, the trial court, if it so construed the statute for the first time to apply to Mishkin, it denied him of due process. It thus rendered a construction to catch Mishkin in its net. The statute according to *Winters* must be clear so that persons may know *in advance* what is proscribed. The Constitution does not permit a court to make a guinea pig of a person in order to supply legislative omission. The legislature should have been clear in the first instance. *Lanzetta* v. *New Jersey,* 306 U. S. 451. See also the order of this court in the *Winters* case reported in 91 L. ed. 1873 in which this court requested

counsel to argue the following:

> "2. In view of such construction, assuming the answer to the first question is in the affirmative, was the conviction herein compatible with the Fourteenth Amendment, considering the state of the law to have been what it was at the time that the acts were committed for which the conviction was had?
>
> 3. In view of the construction herein given by the Court of Appeals to subsection 2 of § 1141 of the New York Penal Code, what was the law, binding upon this Court, which governed the acts for which the conviction herein was had? Was the conviction under such controlling law, as applied to this defendant at that time, compatible with the Fourteenth Amendment?"

In deciding the *Winters* case, this court did not answer those questions, because it assumed, for the sake of argument, that the defendant was apprised of the charge. But in doing so, the court cited the *Lanzetta* case for reference to the proposition that due process requires that the defendant, charged with a crime by a statute, construed for the first time, cannot be gathered into the net newly cast by such construction to catch him within it.

## III

**Because the theories under which defendant was convicted are diverse a reversal must follow if any one is held invalid.**

This case was tried, according to the prosecution (see quotation of his words above), on the theory that most of the books fell within the sadistic-masochistic part of the statute and other books within the obscenity provisions. There is no way of determining from the decisions

below on which theory any one of the books was condemned. Accordingly, under *Stromberg* v. *California,* 283 U. S. 359, 368, a reversal must follow.

## IV

**There is no proof that the defendant knew that the books were obscene or sadistic-masochistic.**

Assuming for the purposes of this argument that the appellant published all the books set forth in the information (which is not the charge nor the evidence) and that as a publisher he had knowledge of the *contents* of the publication. Nevertheless, there is no proof that he had knowledge that such contents were of the character within the intendment of the law. This was raised at the trial (R. 126, 682).

From *Smith* v. *California,* 361 U. S. 147, is to be learned that a defendant not only must know the contents of the book, but must know that they are of the character proscribed. In other words, it must be shown that the defendant had made an evaluation judgment concerning the books. The existence of a *mens rea* said the Court "is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." This means that it had to be shown not only that the defendant knew the books' contents, but knew they were of the character the law forbade.

This Court said: "and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing bookseller, even though they had not the slightest notice of the *character* of the books they sold" (emphasis supplied). Again Justice Black in concurrence said, "The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an 'obscene' book *even though he is unaware of its obscenity.*"

Justice Frankfurter, concurring, said: "But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable *with knowledge of the obscenity*" (emphasis supplied).

The New York Court of Appeals in *People* v. *Finkelstein*, 9 N. Y. 27, 342, said (p. 349):

> "A reading of the statute as a whole clearly indicates that only those, who are in some manner *aware of the character* of the material they attempt to distribute should be published." (emphasis supplied.)

It is clear from the use of the word "character" of the material that the Court agreed with counsel's contention that it is more than mere knowledge of "content" that is required.

There is not a scintilla of proof that the appellant knew the books to be obscene or sadistic or masochistic. He might have known they were erotic; but that knowledge is not sufficient.

*Roth* v. *United States*, 354 U. S. 476, established that a book has to be read *as a whole* in order that it may be evaluated as subject to the statute.

Since it took reading and studying after the trial by a court to determine whether the book fell within the strictures of the statute, how can a judgment of its obscenity be determined without proof that the appellant read it as a whole and made a judgment about it?

If obscenity can be established only after reading of a book as a whole, how can *knowledge* of the obscene contents be asserted against the appellant based on anything but the reading of it?

It is not a satisfactory answer to this problem that if proof of knowledge of the obscene character is to be required, then it would not be possible to prosecute for this

crime. This is an assumption that has not found itself tried in experience, for as Mr. Justice Brennan said in *Smith* that accommodation of prosecution is not a sufficient reason to dispense with constitutional protections.

Moreover, as has been shown, that in order to fulfill constitutional requirements in the free press areas, *Smith* held that it is necessary that proof of knowledge of the *character* of the material be shown. From the language of the Supreme Court and Court of Appeals quoted above, knowledge of the character of the publication was recognized as the requirement.

Nor is it necessary for the appellant to offer suggestions as to how such proof is to be presented. The burden is on the prosecution to justify the suppression of publications, and it is for it to discover the method for sustaining the burden.

Since the prosecution has failed to establish *scienter*—an indispensable element—the judgment of conviction should be reversed and the information dismissed.

## V

### The books are not obscene within the meaning of the Fourteenth Amendment.

In *Roth* v. *United States,* 354 U. S. 476, the test was laid down whether to the average person, applying contemporary standards, the dominant theme of the material, taken as a whole, appeals to prurient interests. Do these books appeal to prurient interests? At worst, these books can be described as trashy or vulgar. Instead of being an aphrodisiac, they are probably a bore. The trial court found them "sickening" (R. 716). Such a characterization is diametrically opposed to an appeal to pruriency. They would have the opposite effect. Instead of stimulating, they sicken. Such effect is not what *Roth* condemned.

A recent case decided by the Court of Appeals for the Second Circuit, *United States* v. *Klaw,* decided July 15, 1965, not yet reported, provides illumination on the constitutional problem involved in the literature in this case. The comprehensiveness of the opinion of the court by Judge Moore invites its study. Because it is not yet reported, it is set forth in full in Appendix B hereto. The court there reversed a conviction of a publisher of books similar to the ones involved in this case. Some of the titles are the same. Indeed, some of the titles in the present case for which Mishkin, the appellant here, is charged with possessing, were published by Nutrix, in the *Klaw* case. Other titles in this case bear similarity. They are what Judge Moore refers to as the "bondage" type of books. They are not intended to appeal to the "average man" of Roth, but rather to the deviant type of person referred to in the *Manual Enterprises* case.

Judge Moore in *Klaw* points out that in approaching this censorshp problem the history of the litigation in this court must be observed, and that it shows that the censor has been defeated in all cases, save three from 1952 to 1965, and that such cases included books like "Tropic of Cancer" and others. From that he concludes that his court could not conscientiously bring these "bondage" books within the scope of the obscenity statutes. He says:

> "It may be conceded that the 'sado-masochistic' trash disseminated by Nutrix is not artistic or aesthetically pleasing. Nor is any claim made that it has any redeeming literary or social value whatsoever; it is difficult to imagine such a claim being made, at least on traditional grounds."

Since there was no proof in that case—as is also lacking in this one—by the prosecution that this type of literature produces a prurient stimulation and response; and that this is especially true, "when the prurient interest may be

that of a deviant segment of society whose reactions are hardly a matter of common knowledge. It may well be that there are characters and cults to which exaggerated high heels, black patent leather bindings and bondage poses have some occult significance, but we doubt that any court would take judicial notice of the reaction that deviates—or the average man—might have to such stimuli".

The court concluded that in the absence of proof that such material was prurient to the deviant or even the average man, the requirements of the First Amendment were not fulfilled.

Added the court:

> "Many would doubt that a judicial system that puts its permissive stamp of approval upon such books as 'Tropic of Cancer' and 'Fanny Hill', to name a few, or certain magazines for homosexuals and sunbathers should then incarcerate or penalize these two defendants for disseminating and publicizing material which might or might not (there is no proof) appeal to someone's 'prurient interest'. Indeed, we can sympathize with Klaw's plight were he to find 'Fanny Hill' or 'Tropic of Cancer' in the prison library, or, if others had pre-empted the only copies, there were available 'Pleasure Was My Business', see Tralins v. Gerstein, 378 U. S. 576 (1964), which contains 'numerous descriptions of abnormal sex acts and indecent conversations supposed to have taken place in (a) Florida brothel.' "

It should be emphasized that neither the trial court nor any of the courts analyzed or dealt with these books on an individual basis. They were all lumped together and characterized as a whole, as the Court of Appeals did in the *Klaw* case. It is therefore impossible to ascertain which books were held to be sadistic or masochistic or obscene. They were all regarded as sickening trash.

We submit that the books in this case fall within the category of those in *Manual Enterprises* as books for those "unfortunate persons whose patronage they were aimed at capturing" (370 U. S. 478, 490) and as in *Klaw* most adults would accept them as such. See also, *A Quantity of Books* v. *Kansas,* 378 U. S. 205; Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 114-115.

Whatever high intellectual level these books lack, cannot serve to deprive persons who may find interest in them. And the converse is obvious, that those persons who do not wish to read them can refrain from doing so.

See also, *One, Inc.* v. *Oelsen,* 355 U. S. 371; *Grove Press* v. *Gerstein,* 378 U. S. 577; *Tralins* v. *Gerstein,* 378 U. S. 576; *Jacobellis* v. *Ohio,* 378 U. S. 184; *Times Film Corp.* v. *The City of Chicago,* 355 U. S. 835.

## VI

**Section 1141 Penal Law suffers from vagueness insofar as obscenity lacks definition.**

Although the *Roth* case attempted to define obscenity, the lack of definition remains. Emerson, "Toward A General Theory of the First Amendment", 72 Yale L. J. 877, 938. Judge Moore in the *Klaw* case, Appendix B hereto, compendiously recites the confusion and difficulties that confront the judiciary as well as the bookseller. His opinion in its entirety is a survey of the pitfalls that beset a publisher or distributor. It is well highlighted in the excerpt just quoted.

The guessing at what the law permits and what it forbids has resulted in a three year prison sentence and a $12,000 fine imposed on Mishkin. It is less than justice to impose such penalties because the guess was wrong at a law that is not clear to anyone.

Of course, the dificulty arises,—and perhaps is the difficulty inherent in all laws that attempt to deal with subjective standards and personal taste. When a standard of pruriency is fixed as that of the "average" man, there is an attempt to peer into a most subtle emotional experience that is hardly of the same nature and degree in common with others. How, therefore, is the average man to be determined? Words may be uttered fixing such a standard but the phenomena of life does not comport to the words. As a result, while rendering lip service to a formula, a tribunal unintentionally injects the various subjective reactions of its constituent members. It then follows, as in this case and as in *Klaw,* that the reaction to the publication is one of repugnance. But repugnance is not the same as obscenity. Or, the reaction may be that no standard is necessary, that it is "hard-core pornography", which is another elusive term to escape the difficulties of defining "obscenity". It does not help, because "hard-core pornography" becomes difficult to define, as is obscenity. And it is dangerous to abandon the search for a verbal standard in preference for one that can be defined when seen. It can be supposed that most of the banned literature of the past beginning with the "Decameron" could have met the same optical condemnation. *Manual Enterprises,* we believe, does not permit of such facile disposal.

Nor should literary skill or excellence be the test for absolving a book otherwise deemed prurient, for it would lead to judges becoming literary critics and arbiters of desirable literary standards.

The way out of the wilderness was pointed out in *Winters* v. *New York,* 333 U. S. 507, 510, when it said: "What is one man's amusement teaches another's doctrine. Though we see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

If the statute is construed as the appellee argued below, and in its Motion to Dismiss, in this court, to be aimed

against "what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification" (citing *People* v. *Richmond County News*, 9 N. Y. 2d 578), the answer is that the construction so put on the statute is likewise vague under the *Winters* case, because those characteristics can be applied to any literature, for literature, whether it is the Bible or Shakespeare or contemporary books, is full of morbidity, perversity and the bizarre, whether sexually or otherwise. How can this defendant therefore be singled out of the profusion of literature with such characteristics?

Moreover, why under the Constitution should anyone be forbidden to disseminate or to read what is morbid, perverse or bizarre? Since those elements are a part of literature they cannot be extracted without affecting the function of literature itself. Literature as such is protected by the Constitution. Needless to repeat,—those who do not wish to read it may avoid it.

Under the statute as it reads and as construed the lot of a publisher, such as Mishkin, is similar to that of the Court of Appeals in *Klaw* when it is said:

> "Nor is mere 'patent offensiveness' enough. There must in addition be the requisite prurient appeal. Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? Judged by whom? On what basis? For example, it is the 'average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community standards' operate to reduce potential prurient appeal? Or do they operate to establish that some

'redeeming social importance' is present? Or, do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme' indicate that the prospective prurient appeal is great or slight? Or does it suggest that other themes will supply the redeeming social importance? Perhaps the Roth statement is too compact—an unsurprising failing in an initial formulation; the Court itself has acknowledged that it 'is not perfect'. Jacobellis v. Ohio, supra, 378 U. S. at 191. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the wisp."

We believe that we have demonstrated that the statute as applied is vague and indefinite, and does not afford a standard for determining in advance the behavior that is reached by the statute.

## VII

### The books were seized in violation of the First Amendment and the Fourth Amendment.

This case was commenced and tried before the decision of this court in *Mapp* v. *Ohio,* 367 U. S. 643. Until the decision by this court in *Mapp,* the New York courts were governed by *People* v. *Defore,* 242 N. Y. 13, which allowed in evidence materials seized even in violation of the Fourth Amendment. Accordingly, the trial court neither explored the question when raised nor was the New York procedure fashioned in any manner to receive such challenges.

The evidence is that six police officers went to a building at 37 West 20th Street, New York City and in a basement room about 25 by 30 feet and 12 feet high, where a "quantity" of books were seen, and they "seized them all" (Rp. 134). The prosecution promised to produce the police officer, who it was alleged, obtained a search warrant

(Rp. 136). This was never done, although the evidence was admitted subject to the production of that witness by the appellee (Rp. 136).

The tally of the amount of books seized shows that 17,121 volumes were seized (Rp. 139-143). It took two days to remove all the books in the room (Rp. 137). Exhibits 1 through 42 referred to in the Information were among those seized in that room (Rp. 137). This case involves a more flagrant seizure than in *A Quantity of Books* v. *Kansas,* 12 L. ed. 2d 809, for in the *Kansas* case at least an attempt was made toward specificity in the search warrant and the district judge there held a 45-minute hearing in which he examined the books. In this case nothing was done to substantiate the alleged search warrant, although the prosecution had promised to do so (Rp. 136). And the testimony as to the exhibits were received subject to the production of that witness. In *Marcus* v. *Search Warrants,* 367 U. S. 717, an attempt was made to justify the seizures by a warrant addressed to vague "obscene" books. Here, if there was a warrant, its character is completely lacking because it was never produced although promised.

The subject was not further pressed or pursued because of the existing New York law. But since the issue was raised, the constitutional question remained open, *People* v. *Loria,* 10 N. Y. 2d, 368; and *People* v. *Coffey,* 11 N. Y. 2d, 142, where *pre-Mapp* issues, still open, were remitted to the trial court for a hearing. The issue therefore is still before this court to determine whether the seizures of literature were consistent with constitutional protections. *Marcus* v. *Search Warrants of Property, etc.,* 367 U. S. 717; *Jones* v. *United States,* 357 U. S. 493; *Kremen* v. *United States,* 353 U. S. 346.

The appellee argued below that there could not have been an illegal seizure because the person with whom the publications were stored consented thereto. It is certainly a strange doctrine that another person may waive the con-

stitutional rights of the accused, in the absence of some express authority to waive such constitutional rights. See *Stanford, Jr.* v. *Texas,* —— U. S. ——, January 18, 1965; 13 L. ed. 2d 431, where the seizure was with the permission of the wife of the accused.

The appellee also argued that appellant "waived" the production of officer Dimler with respect to the validity and adequacy of the search warrant. Such a waiver is not borne out by the record. Objection to their admission was made by appellant (Rp. 154).

As to the remaining volumes used in evidence (comprising Exhibits 43-72), no warrant for their seizure in large quantities was obtained (Rp. 143-156), and the principles of the *Marcus, Mapp* and *Kansas* cases were violated.

The appellee has sought to justify these wholesale seizures without a warrant (Rp. 153, bottom, 154, 155) in that they were on shelves and racks in three bookstores open at the time to the public. Assuming those were the facts, does this excuse the absence of a warrant? If so, then any police officer may with his own interpretation of offensive literature—interpretation which often eludes the wisest—enter a bookstore and seize any title he chooses or thousands of copies of them, completely ransacking a store and putting it out of business. Yet this is what the appellee is contending he may do. A more frightful use of police power against publications can hardly be imagined! In this case the enormity is compounded by the thousands of copies that were thus seized.

The protections which this court in *Kingsley Books* v. *Brown,* 354 U. S. 436, announced as a minimum protection by the courts in advance of seizure, would thus be frustrated. Also, when books are the subject of seizure this court has insisted that a warrant must describe the items to be seized with "scrupulous exactitude", *Stanford* v. *Texas, supra.*

Were a public officer to be permitted to seize books at will because he believed them banned, or to use a term more palatable, that he believed them to be "contraband," the protections of the First Amendment would surely be defeated along with those of the Fourth. It would provide a loophole for public officials to seize and censor without court approbation. *Bantam Books* v. *Sullivan,* 372 U. S. 58.

The *Marcus* case is the clearest condemnation by this court of this unlawful exercise of censorship through the subterfuge of calling books "contraband". The searches in such cases take on the vicious form of a hunt for evidence, which this court rejected as early as *Boyd* v. *United States,* 116 U. S. 616.

## CONCLUSION

### The judgment below should be reversed.

Punishment of a person by imprisonment for three years and a $12,000 fine because he had disseminated books is shocking enough to rouse meticulous inquiry by those who cherish the freedom of the press.

We believe it has been demonstrated that the prosecution of the appellant must fail because the unsegregated charges of distributing sadistic and masochistic books cannot square with the constitutional protections of all literature, save those that can be clearly found to be within the ambit of obscenity. Moreover, the statute is vague by condemning sadistic and masochistic literature, since those words have broad meanings.

The books themselves, while not of a cultural level, may have an appeal to those to whom they have value. Instead of being prurient, they may be on the contrary, sickening to the average person. The statute itself is vague in

definition of what is condemned as obscene, giving it the construction of the New York Court of Appeals in the *Richmond News* case.

There has been no proof that defendant knew that the books offended the statute.

It has been demonstrated that the vast quantity of books seized and used as the basis of the prosecution were violative not only of the Fourth Amendment, but also the First Amendment in enabling a police officer to ransack open bookstores without a warrant, merely on his opinion that the books are reached by the statute. There has also been an invasion of constitutional protections by the absence of a warrant or proof of its scope, although the prosecution had promised to produce such proof when the evidence was admitted subject to such proof.

Respectfully submitted,

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HAnover 2-1023

August 16, 1965.

## Appendix A

### Exhibit A

SECTION 1141. OBSCENE PRINTS AND ARTICLES

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, or advertise in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, card, phonograph record, picture, drawing, photograph, motion picture film, figure, image, phonograph record or wire or tape recording, or any written, printed or recorded matter of an indecent character which may or may not equire mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, poses for, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, photograph, motion picture film magazine, pamphlet, newspaper, story, writing, paper, card, phonograph record, figure, image recording, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, lascivious filthy, disgusting or indecent books, picture, photograph, motion picture film, writing, paper, card, phonograph record, figure, image, recording, matter, article or thing, named in this section can be purchased, obtained or had or who

has in his possession, any slot machine, motion picture projector or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawings, image, recording, article or object, or who shows advertises, exhibits or transmutes the same, or causes the same to be shown, advertised, exhibited or transmuted, or who buys, owns or holds any such machine with the intent to show, advertise, transmute, or in any manner exhibit the same; provided, that this subdivision shall not apply to motion picture films licensed by the state department of education; or who,

2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or to be fined not less than one hundred fifty dollars, not more than two thousand dollars or both fine and imprisonment for the first offense; for the second offense, shall be sentenced to not less than thirty days nor more than one year or be fined not less than two hundred fifty dollars nor more than three thousand dollars or be both fined and imprisoned; for a third offense, shall be sentenced, to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.

3. A person who hires, employs, uses or permits any minor to do or assist in doing any act or thing mentioned in this section is guilty of a misdemeanor and, upon conviction, shall be sentenced to not less than thirty days

or more than one year imprisonment or be fined not less than two hundred fifty dollars nor more than two thousand dollars, or both fine and imprisonment for the first offense and for a second or subsequent offense shall be sentenced to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.

4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section.

5. The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section.

## Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 70—September Term, 1964

(Argued October 15, 1964 Decided July 15, 1965)

Docket No. 28887

UNITED STATES OF AMERICA,

*Appellee,*

—against—

IRVING KLAW and JACK KRAMER,

*Defendants-Appellants.*

Before: WATERMAN, MOORE and SMITH, *Circuit Judges.*

Appeals from judgments of conviction for mailing obscene matter and conspiring to do so entered in the Southern District of New York, after a trial before Inzer B. Wyatt, *Judge,* and a jury.

Reversed.

MOORE, *Circuit Judge:*

Irving Klaw and Jack Kramer were indicted on one count for conspiring to violate 18 U.S.C.A. § 1461 by knowingly using the mails for the carriage of "articles, matters, and things, which were non-mailable in that they were obscene, lewd, lascivious, indecent, filthy and vile." They were also charged with having knowingly used the mails to distribute

"circulars, advertisements and notices which were non-mailable in that they gave information directly and indirectly, where, how, from whom and by what means certain obscene, lewd, lascivious, indecent, filthy and vile matters and things might be obtained." In addition, Klaw was indicted on forty-three counts for using the mails to transmit "certain articles, matters and thing . . . , to wit, printed circulars, pamphlets, booklets, drawings, photographs and motion picture films, which were non-mailable in that they were obscene, lewd, lascivious, indecent, filthy and vile." Nine of these counts were eventually dismissed, leaving thirty-four. Klaw was also indicted on forty-one counts for using the mails to carry certain "circulars, advertisements and notices, . . . which were non-mailable in that they gave information directly and indirectly, where, how, from whom and by what means, certain obscene, lewd, lascivious, indecent, filthy and vile articles, matters and things might be obtained." Eleven of these counts were eventually dismissed, leaving thirty.

The conspiracy was said to have run from June 1, 1960, until the date of the indictment, June 27, 1963. The substantive counts were each based on individual mailings of materials over a period running from July 25, 1958, to May 6, 1963.

At a jury trial, the Government produced six witnesses whose receipt (or whose son's receipt) of circulars and materials had been the basis of thirteen of the thirty-four "obscene materials" counts and ten of the thirty "publicizing" counts. The lion's share of these mailings had been to one Duane Thoman of LaGrange, Kentucky, which name was one of the 300 or so aliases of Postal Inspector Harry Simon of Washington, D. C., who testified at the trial. Three of the Government's witnesses were parents who, while rummaging through Junior's bureau drawer, found that their respective adolescent offspring were exploring

on their own a new world just coming into view. One Junior also testified but only as to his receipt of items from Nutrix.

Klaw is the owner of Nutrix Co., a New York based establishment that prints and publicizes materials—stories, photographs and drawings in the "bondage" genre. Much solicitation and distribution is carried on through the mails, particularly by way of mail order ads appearing in magazines likely to have a male clientele. These "bondage" booklets usually contain some twenty to twenty-five photographs or crude drawings of females—some scantily clad, some tightly trussed, and all voluptuous—subjecting other women and men to various tortures and indignities, including violent and forcible deformation of the body, while being gagged, fettered and bound in bizarre postures. The booklets bore such titles as "Sorority Girls Stringent Initiation," "Female Doctor Forced into Bondage," "Girls Concentration Camp Ordeals," "Dominating Woman Turns Man into Girl," "Men in the Ladies Room," and the like. A text in each booklet described in a puerile and asinine fashion the activity depicted in the drawings. One booklet entitled "The Devil of Yocherwalden" pictures female "Gazi" guards subjecting female prisoners to brutal tortures at the direction of the "Gazi" commandant "Elsi Achstunk." The captives and tormentors are drawn with exaggerated female physical characteristics, clothed in tight-fitting garments, wearing black leather shoes with very high heels, and posed in unreal positions. There were also photographs of "Fighting Girls," corset and high heel shoe scenes, and girls in rubber apparel. Photographs offered for sale were in many instances taken from motion pictures said to have been recently released, such as "Blood of the Vampire," "Slaves of Carthage," and "The Mystery of the Black Whip." Amateur "bondage" photographs were often

solicited. Bulletins published by Nutrix advertised its publications in various bondage series. All these materials are described to us as being "sado-masochistic," and we are referred to Krafft-Ebing's *Psychopathia Sexualis* for further elucidation.

Nutrix is apparently a long-time disseminator of substantially the same type of bondage materials as those involved here. Surveillance by the Postal authorities (Inspector Simon) had commenced in 1951 and continued for four years, at which time no criminal reference was made. However, an administrative proceeding was then begun which culminated in the Postmaster-General's ordering that mail addressed to Klaw be marked "unlawful" and returned to the sender, pursuant to then 39 U. S. C. A. § 259a (now 39 U. S. C. A. § 4006). Klaw sought to enjoin the Postmaster from implementing that order, but was unsuccessful. See *Klaw* v. *Schaffer,* 151 F. Supp. 534 (S. D. N. Y. 1957). This court affirmed *per curiam* the District Court's conclusion that the Postmaster General had acted within his statutory authority and that there was substantial evidence in that record to support the hearing examiner's finding that the material was obscene. 251 F. 2d 615 (2d Cir. 1958). This court's judgment was vacated by the Supreme Court on other grounds and the complaint was dismissed. 357 U. S. 346 (1958). Thereupon Inspector Simon resumed his investigation. In 1960 he recommended prosecution, but no official action was taken until 1963. Kramer apparently began working for Nutrix in 1960 as manager of the New Jersey warehouse. In addition to these facts, the jury also had visual impressions from observation of the Nutrix materials introduced on trial.

Defendants were found guilty on each of the sixty-five counts that went to the jury. Klaw received concurrent sentences of two years' imprisonment on counts 1 to 5, with a $1,000 fine on each count; he received a suspended sen-

tence on each of the remaining counts.[1] Kramer was fined $2,500 on count 1 and received a suspended sentence. Both Klaw and Kramer appeal, claiming that their motion for a directed verdict of acquittal was erroneously denied because there was insufficient evidence relating the Nutrix materials to "obscenity" or to "prurient interest."

In approaching this controversy arising out of another of our society's attempts at censorship, it is helpful to have in mind the scope of the problem and the variety of ways in which it arises. Cases in the Supreme Court over the past decade or so have come into being because state and city police officers, state attorneys, general and federal district attorneys, state motion picture licensing bureaus, state youth morality commissions, federal Post Office Examiners and Inspectors, state and federal judges, and juries have considered a variety of movies, books and magazines to be "sacrilegious," "immoral," "obscene," or "objectionable." The specific items have run the gamut from motion pictures like "The Miracle," "La Ronde," "M," "Native Son," "The Game of Love," "Lady Chatterley's Lover," "Les Amants," and "A Stranger Knocks" to books like "Nights of Horror," "Peyton Place," "Pleasure Was My Business," and "Tropic of Cancer," to magazines like "One—The Homosexual Magazine," "MANual," "Trim," "Grecian Guild Pictorial," "Playboy," "Rogue," "Frolic," other "girlie-type" magazines, and nudist magazines. Publishers, exhibitors, distributors and sellers of these materials have been subjected in state and federal courts and agencies to set-backs includ-

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[1] The conspiracy count was punishable by up to five years' imprisonment and a fine of up to $10,000. 18 U. S. C. A. § 371. Knowing use of the mails for the carriage of non-mailable matter is punishable by up to five years' imprisonment and a fine up to $5,000 for the first offense, and up to ten years' imprisonment and a fine of up to $10,000 for each subsequent offense. 18 U. S. C. A. § 1461.

ing stiff fines and jail sentences, seizure of the materials, injunctions against distribution, denial of licenses needed to exhibit a motion picture, and loss of the privilege to use the United States mails to distribute and publicize the materials.

The censors' successes have been short-lived, however, for in virtually every case decided by the Supreme Court, the disseminator has had a favorable result on one ground or another, save for three cases decided on one day in 1957.[2] Two are significant here—*Roth* v. *United States* and *Alberts* v. *California,* both reported at 354 U. S. 476 (1957), which deal with the constitutional protection and definition of "obscenity," and which constitute the first and

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[2] For convenience we list chronologically the Supreme Court's relevant "obscenity" and censorship decisions. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952) (movie license; "sacrilegious"); *Superior Films, Inc.* v. *Department of Education* (same, "obscene") and *Commercial Pictures Corp.* v. *Regents of the University of the State of New York* (same, "immoral"), 346 U. S. 587 (1954); *Roth* v. *United States* (conviction; "obscene"), and *Alberts* v. *California* (same; same), 354 U. S. 476 (1957); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957) (injunction; same); *Times Film Corp.* v. *City of Chicago,* 355 U. S. 35 (1957) (movie license; same); *One, Inc.* v. *Olesen,* 355 U. S. 371 (1958) (mail; same); *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372 (1958) (same; same); *Kingsley Int'l Pictures Corp.* v. *Regents of the University of the State of New York,* 360 U. S. 684 (1959) (movie license; "immoral"); *Smith* v. *California,* 361 U. S. at 147 (1959) (conviction; "obscene"); *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961) (seizure; same); *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962) (mail; same); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963) (warnings; "objectionable"); *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964) (conviction; "obscene"); *A Quantity of Copies of Books* v. *Kansas,* 378 U. S. 205 (1964) (seizure; same); *Tralins* v. *Gerstein,* 378 U. S. 576 (1964) (injunction; same); *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (1964) (same; same); *Freedman* v. *Maryland,* 380 U. S. 51 (1965) (movie license); *Trans-Lux Distrib. Corp.* v. *Board of Regents of the University of New York,* 380 U. S. 259 (1965) (same; "obscene").

apparently only opinion subscribed to by a majority of the Court. In both cases convictions for violation of federal and state statutes pertaining to "obscenity" were upheld by divided Courts—5 to 4 in *Roth*, and 6 to 3 in *Alberts*.

But if the censors won the battles of *Roth* and *Alberts*, the subsequent application of the principles of those cases suggests that as far as the war against pornography goes, the victory was only Pyrrhic. Since 1957 and *Roth* the "obscenity" situation has advanced rapidly. Then Lady Chatterley was still enjoying her clandestine sylvan trysts with her earthy gamekeeper; Fanny Hill's lively and apparently continuous actions were known only to the foreign traveling elite or to the reader of a smuggled copy; and "Tropic of Cancer" was still being seized by vigilant customs agents as contraband. Suddenly the entire picture changed. Whether encouraged by the courts, or whether literary styles turned towards super-realism, or both, authors and publishers were quick to capitalize on the "modern" trend—a trend which they largely made. "Lady Chatterley's Lover" in paperback editions was sold to countless thousands with the court's opinion of approbation attached as a major part of its advertising. No longer did Constance enjoy the privacy of her woodland. Millions of eyes ogling with interest ("prurient" interest probably) stared at her and her lover whilst they enjoyed those moments which court opinions cannot describe lest they risk going "substantially beyond customary limits of candor in description or representation of such matters." *Roth, supra*, 357 U. S. at 487, n. 20.

"Tropic of Cancer" was brought out from under the counter and dusted off. In 1962 it was approved (four justices approving three dissenting) for public reading by a Massachusetts court. See *Attorney General* v. *The Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N. E. 2d 328 (1962). In Wisconsin by an equally close vote (four-to-three), the Supreme Court reversed a lower court decision declaring

the book "obscene" and held that, although "much of the language in the book would be offensive to many" and that in one or two instances the "short English words of ancient origin" were "obscene," nevertheless, despite the fact that some episodes would "appeal to prurient interests," it was the court's duty "to respect and enforce in full measure the freedom of expression guaranteed by state and federal Constitutions." *McCauley* v. *Tropic of Cancer,* 20 Wis. 2d 134, ——, 121 N. W. 2d 545, 554 (1963). The Supreme Court of California reviewed a decision determining the book to be "obscence" and, after a comprehensive survey of post-*Roth* decisions, unanimously reversed. *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152, *cert. denied,* 375 U. S. 957 (1963). The New York Court of Appeals in *People* v. *Fritch,* 13 N. Y. 2d 119, 192 N. E. 2d 713, 243 N.Y.S. 2d 1 (1963) also by a four-to-three vote held the same book to be "obscene" and reversed a determination by the County Court to the contrary, thus reinstating a conviction by a jury, although ordering a new trial on the issue of *scienter.* This decision, however, the same court (also by a four-to-three vote) considers as having been "now overruled by *Grove Press* v. *Gerstein* (378 U. S. 577)." *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 404, 200 N. E. 2d 760, 763, 252 N.Y.S. 2d 71, 75 (1964).

The most cursory perusal of the cases makes it obvious that the various agencies, officers, judges and juries that initially find material "obscene" do not have the last word to say on the matter. Rather, the Supreme Court has left no doubt that any abnegation of judicial supervision in the "obscenity" field would be inconsistent with its duty to uphold constitutional guarantees. The issue "must ultimately be decided by this [the Supreme] Court." *Jacobellis* v. *Ohio,* 378 U. S. 184, 188 (1964). Mr. Justice Brennan explicitly declared that "this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally

protected." *Id.* at 190. He added that "this is precisely what the Court did in *Times Film Corp.* v. *City of Chicago,* 355 U. S. 35; *One, Inc.* v. *Olesen,* 355 U. S. 371; and *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372." *Id.* at 190, n. 6. In examining the material in *Times Film,* the Supreme Court did not yield in its judgment to the Chicago Police Commissioner and persons appointed by him to inspect the film, "The Game of Love," a District Court judge, and the Court of Appeals for the Seventh Circuit, which found that "the calculated purpose * * * and its (the film's) dominant effect, are substantially to arouse sexual desires." 244 F. 2d 432, 436 (7th Cir. 1957). In *One, Inc.,* the Postmaster, a district judge and the Court of Appeals for the Ninth Circuit had determined that the homosexual magazine "One" had "a primary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it," 241 F. 2d 772, 778 (9th Cir. 1957). And in *Sunshine Book,* the Postmaster, a Hearing Examiner, the Department Solicitor, the District Court and five out of eight judges on the Court of Appeals for the D. C. Circuit found a "nudist" magazine to come within the proscription of the statute. 249 F. 2d 114 (D. C. Cir. 1957). Thus, the Court has definitely accepted the responsibility of being the final arbiter and has refused to accept the judgments of officials, judges or juries to the contrary. The "sufficient evidence" test on review advocated by the Chief Justice has not been adopted. See *Jacobellis* v. *Ohio, supra,* 378 U. S. at 190, n. 6 (dissenting opinion). The burden on this court at this appellate stage should be no less. And the enlarged judicial function in this area requires that we consider the proof or lack thereof and the manner in which the case was placed before the jury, not just whether the material could possibly be brought within the range of the so-called "obscenity" statute. What, then, upon review, does this record disclose?

*Appendix B.*

The Government rested its case largely on a showing of the exhibits themselves insofar as proof of the "obscene" nature of the Nutrix materials was concerned. As for those exhibits, we need add little to what we have already said. It may be conceded that the "sado-masochistic" trash disseminated by Nutrix is not artistic or aesthetically pleasing. Nor is any claim made that it has any redeeming literary or social value whatsoever; it is difficult to imagine such a claim being made, at least on traditional grounds. *But cf. People* v. *Birch,* 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sup. Ct. 1963).

As for the statute involved, it is hardly a model of drafting precision or clarity. Section 1461 and the subsequent sections of the "obscenity" chapter are regrettably short on terminological and grammatical consistency. Thus, section 1461,[3] which is entitled "Mailing obscene or crime-inciting matter," refers in one part to matter that is "ob-

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[3] Section 1461 provides in full:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can,

*(Footnote continued on following page)*

scene, lewd, lascivious, indecent, filthy or vile"; the other part, dealing generally with abortion and conception prevention, refers to "indecent or immoral" uses and purposes.[4] For section 1461 only "indecent" is specifically de-

*(Footnote continued from preceding page)*

be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mail or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent," as used in this section includes matter of a character tending to incite arson, murder, or assassination.

[4] The third group of 41 counts (reduced to 30) against Klaw were apparently based on the part of § 1461 declaring nonmailable, and thus unlawful to use the mails for circulating or disposing of, certain circulars, advertisements and notices giving information about "obscene" matters. The basis of these counts would seem to be a combination of the first and fourth paragraphs of § 1461. However, it is not entirely clear on the face of the statute that the fourth paragraph is at all related to the first—the only one mentioning "obscene" —being rather just a part of the second through sixth paragraphs, which deal throughout with abortion and conception prevention and other indecent or immoral uses. For example, in § 1462, relating to transportation by common carrier, "obscene" books and the like are dealt with in subsection (a), "obscene" recordings and the like are dealt with in subsection (b), and subsection (c) deals only with abortion and conception prevention items and material giving information about such items. The statutory development shows that substantially the present wording of § 1461 was first enacted in Act of

*(Footnote continued on following page)*

fined to include matter "tending to incite arson, murder, or assassination." Section 1462,[5] entitled "Importation or transportation of obscene matters" refers to certain matters that are "obscene, lewd, lascivious or filthy" (but not "vile") or of "indecent" character, as well as "indecent and immoral" uses (again, in a subsection relating to abor-

*(Footnote continued from preceding page)*

July 12, 1876, ch. 186, 19 Stat. 90. The text was cast in its present paragraphed form by the 1949 revision of the criminal code, ch. 768, 62 Stat. 768. The predecessor of § 1462 was Act of February 8, 1897, ch. 172, 29 Stat. 512, which was cast in a form similar to the predecessors of § 1461. Explicit paragraphs and subsections did not appear until Act of May 27, 1950, ch. 214, 64 Stat. 194. However, given our disposition of the case we need not determine whether § 1461 applies to circulars giving information about "obscene" matter, as opposed to simply matters, articles and things "for preventing conception or producing abortion, or for any indecent or immoral use." Moreover, the Court in *Roth* implicitly assumed, without discussion, that it did. See also the discussions in *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 500-18, 520-24 (1962).

[5] Section 1462 provides in full:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

tion and conception prevention). Section 1463,[6] entitled "Mailing indecent matter on wrappers or envelopes" refers to "indecent, lewd, lascivious, or obscene" (but not "filthy," "vile," or "immoral") delineations and epithets. Section 1464,[7] entitled "Broadcasting obscene language," refers to "obscene, indecent, or profane" (but not "lewd," "lascivious," "filthy," "vile," or "immoral") utterances. Lastly, section 1465,[8] entitled "Transportation of obscene matters for sale or distribution" refers to matter that is "obscene, lewd, lascivious, or filthy" (but not "vile" or "profane") or of "indecent or immoral" character. Thus, as the chapter heading suggests, all five sections are concerned with "obscene" matter. They also each mention "indecent," but apply it variously to "character," "use"

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[6] Section 1463 provides in full:

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obsence character are written or printed or otherwise impressed or apparent, are nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[7] Section 1464 provides in full:

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

[8] Section 1465 provides in full:

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print,

*(Footnote continued on following page)*

and "purpose." The other terms—"lewd," "lascivious," "filthy," "vile," "immoral" and "profane"—are used only sporadically.

It should not be surprising, then, that the results of judicial attempts to apply these and similarly worded statutes consistently with the First Amendment have produced strange results. The broad freedom of expression so preferentially protected by the First Amendment, cf. *United States* v. *Carolene Prods. Co.*, 304 U. S. 144, 152, n. 4 (1938), has been found to have an exceptional enclave for "obscenity." The varied and vague terms in such statutes are often subsumed within the one term "obscene" which is found throughout the federal law. Indeed, "it is doubtful whether any standard other than obscenity could stand the Constitutional test." *People* v. *Brooklyn News Co.*, 12 Misc. 2d 768, 771, 174 N.Y.S. 2d 813, 817 (Kings County Ct. 1958) (Sobel, *J.*); cf. *United States* v. *Keller*, 259 F. 2d 54 (3d Cir. 1958). See also *People* v. *Mishkin*, 26 Misc. 2d 152, 154, 207 N.Y.S. 2d 390, 393 (Ct. Spec. Sess. 1960), *aff'd as modified*, 17 A. D. 2d 243, 234 N.Y.S. 2d 342 (1st Dept. 1962), *aff'd*, 15 N. Y. 2d 671, 204 N. E. 2d 209, 255 N.Y.S. 2d 881 (1964), *probable jurisdiction noted*, 380 U. S. 960

*(Footnote continued from preceding page)*

silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication of two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

(1965) (No. 858, 1964 Term, renumbered No. 49, 1965 Term). See also *Friedman* v. *New York*, 34 U. S. L. Week 3014 (New York Sup. Ct., Jan. 21, 1965), *petition for cert. filed*, 33 U.S.L. Week 3369 (U. S. May 13, 1965) (No. 1161, 1964 Term; renumbered No. 135, 1965 Term). We must take great care, therefore, to see that limitations on materials regarded as "obscene" have no more scope than is necessary to effectuate the permissible purposes of such constraints. Cf. *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957).[9]

We do not doubt that "obscenity" may be regulated because it is thought to incite antisocial sexual behavior and

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[9] While knotty problems are raised if one considers the religious background of many of these laws, see Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963), they need not be dealt with if permissible secular purposes and justifications may be found for them. Cf. *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Two Guys From Harrison-Allentown* v. *McGinley*, 366 U. S. 582 (1961). Compare *Griswold* v. *Connecticut*, —— U. S. —— (1965). While contemporary secular support is being found for proscription of words, thoughts and scenes that were inconsistent with "religious" conceptions, so too has the content of those conceptions itself been changing. Thus, descriptive words fit for one generation of translators of the Bible are unfit for another. See, *e.g.*, Adams, *The Magic and Mystery of Words*, 68 (1963). Similarly, in a stimulating article, Reverend Howard Moody has recently questioned the whole religious approach to obscenity. Moody, *Toward a New Definition of Obscenity*, 24 Christianity & Crisis 284 (1965). Noting that "from a theological or ethical perspective, 'dirty words' are a terribly inadequate base from which to write a definition of obscenity," *id.* at 286, he suggests that our standard of obscenity is "obsessed with sex and vulgar language; . . . [it should be] defined rather as that material which has as its dominant theme and purpose the debasement and depreciation of human beings—their worth and dignity." *Id.* at 287. If at the same time as the restrictions on publication have been loosened the nation has approached "a state of moral decadence, . . . the evidence of this is not to be found in salacious literature, erotic art or obscene films but in the 'soul-rot' that comes from the moral hypocrisy of straining at the gnat of sexuality and swallowing the camel of human deterioration and destruction." *Id.* at 288.

crime. "Obscene" material and conduct may also sometimes be suppressed and penalized because, like a common law nuisance, it constitutes an unreasonably offensive intrusion into the lives of persons who cannot reasonably avoid it. Other reasons for proscription are more troublesome, such as when the "obscenity" might merely be thought to cause sexual or other stimulation or excitement—unrelated to otherwise deleterious behavior—for willing adults who would not be subject to the material if they did not want to be. Also troublesome is regulation of "obscenity" simply because it reflects sexual values differing from current majority morals, cf. *Kingsley Int'l Pictures Corp.* v. *Regents of the University of the State of New York,* 360 U. S. 684, 688-89 (1959). See generally Henkin, *Morals and the Constitution: The Sin of Obscenity,* 63 Column. L. Rev. 391, 392-95 (1963); Kalven, *The Metaphysics of the Law of Obscenity,* in *1960 Supreme Court Review,* 1, 3-4 (Kurland ed.).

However, in considering the permissible meaning of "obscene" in section 1461, we must begin with the Supreme Court's treatment of that statute in *Roth.* That case contains the oft-quoted—although difficult to apply—statement that material is "obscene" if: "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. at 489.[10]

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[10] A problem not discussed in *Roth,* but initially raised in this case, is whether the standard is any different if the typical potential recipient of the "obscene" material may be someone other than the "average man," i.e., a member of a particular group such as a sexual deviate. In *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 481-82 (1962), Justices Harlan and Stewart indicated that the question of the relevant audience was still open, but they did not feel compelled to reach it.

We realize that the Court went on in *Roth* to quote with approval a charge that "the test in each case is the effect of the book, picture

*(Footnote continued on following page)*

*Appendix B.*

In addition to its appeal to "prurient interest," proscribable "obscenity" must be "utterly without redeeming social importance." *Roth* v. *United States, supra,* 354 U. S. at 484; *Jacobellis* v. *Ohio,* 378 U. S. at 191. It must go "substantially beyond the customary limits of candor in description or representation." *Ibid.* (quoting American Law Institute, Model Penal Code formulation also quoted in *Roth,* 354 U. S. at 487 n. 20). It must be characterized by "patent offensiveness." *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482 (1962). In brief, it is "hard-core pornography." *Jacobellis* v. *Ohio, supra,* 378 U. S. at 197.

Thus, material is proscribable "obscenity," or hard-core pornography, if it has the requisite prurient appeal, *and* if it so exceeds customary candor as to be patently offensive, *unless* it has *any* redeeming social importance. The last requirement is part of the broad protective mantle of the First Amendment. But, as counsel for defendants repeatedly emphasized, there is no claim in this case that the Nutrix materials have any redeeming social importance. However, the absence of artistic or literary value or other value of social consequence does not, without more, lead to a finding of proscribable "obscenity." Such qualities would

*(Footnote continued from preceding page)*

or publication considered as a whole not upon any particular class but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community." 354 U. S. at 490. But this brief treatment can hardly be taken as ending the matter. When read in light of the familiar admonition (contained in the same charge) that the reactions of the young, the immature, the prigs, or the highly prudish are not decisive, this passage need mean little more than that putatively "obscene" matter more or less directed to or likely to reach all parts of the community must be appraised on those terms, and not on the basis of its appeal to a small segment of the community. Because there may be good reason for proscribing material that is more likely to reach and be responded to in a prurient way by a deviant segment of the community, we are not convinced that prurient appeal to the average member of the community is the only possible standard.

merely insulate what might otherwise be proscribable due to its offensiveness and prurient appeal. See, e.g., *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760, 252 N.Y.S. 2d 71 (1964) (the novel "Fanny Hill"); *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497 (1964) (satirical monologist); Goldman, *The Comedy of Lenny Bruce,* 36 Commentary 312 (1963); cf. *People* v. *Birch, supra.* But cf. *People* v. *Bruce,* unreported, Crim. Ct. City of New York, 1964 (appeal pending); *Attorney General* v. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* —— Mass. ——, 206 N. E. 2d 403 (1965). Compare *United States* v. *Ginzburg,* 338 F. 2d 12, 14 (3d Cir. 1964), *cert. granted,* 380 U. S. 961 (1965) (No. 807), 1964 Term, renumbered No. 42, 1965 Term.

Nor is mere "patent offensiveness" enough. There must in addition be the requisite prurient appeal. Assuming that "prurient appeal" can be adequately defined, there are still some questions: appeal to whose prurient interest? judged by whom? on what basis? For example, is it the "average person" who applies "contemporary community standards" to determine if the "dominant theme" appeals to "prurient interest" (of someone)? Or is it someone else applying "contemporary community standards" to determine that the "dominant theme" appeals to "prurient interest" of the "average person"? Do "contemporary community standards" operate to reduce potential prurient appeal? Or do they operate to establish that some "redeeming social importance" is present? Or, do they operate to measure the "patent offensiveness" of an excess of candor? Again, does the "dominant theme" indicate that the prospective prurient appeal is great or slight? Or does it suggest that other themes will supply the redeeming social importance? Perhaps the *Roth* statement is too compact—an unsurprising failing in an initial formulation; the Court itself has acknowledged that it "is not

perfect." *Jacobellis* v. *Ohio, supra,* 378 U. S. at 191. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the-wisp.[11]

Having in mind the constitutional constrictions on the breadth of legislation affecting the freedom of expression, if appeal to prurient interest—on either an "average man" or a "deviant typical recipient" basis—is the statutory concern, then it seems desirable, indeed essential, that such appeal to someone be shown to exist. This the Government's view of *Roth* does not require. Nor should it be sufficient merely that the disseminator or publicizer thinks such appeal exists. The stimulation and reaction with which the

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[11] In this case it is the first of these ambiguities that is most bothersome—that is, appeal, if any, to whose prurient interest, judged by whom, and on what basis. Before, during, and at the end of the trial, and now on appeal, the Government's claim has been that the familiar *Roth* test does not require that the material appeal to the average person. "All that it requires is that the dominant theme of the material—that is, the dominant nature of such appeal as it has—be recognizable to the average person as being an appeal to prurient interest." But in so restating *Roth,* the Government has merely chosen one of several approaches to determination of the requisite prurient appeal, one that does not say to whose prurient interest the appeal must go. Another approach is to say that the material must be shown to appeal to the prurient interest of the "average person" (a close cousin to the "reasonable man" whose assumed existence cannot be questioned lest many a legal edifice become a mere house of cards). Since the "average person" is almost always a possible recipient, even if not the typical recipient, the effect on him or her would always seem important. After all, the prurient appeal element is presumably related to the deterrence purpose. And without now questioning the apparent legislative assumption that stimulation of prurient interest leads to significant anti-social behavior, *but cf. United States* v. *Roth,* 237 F. 2d 796, 804, 812-17 (2d Cir. 1956), *aff'd,* 354 U. S. 476 (1957), if the prurient interest of the average person is stimulated there may be cause for regulation. There may also be cause for regulation of material that stimulates the prurient interest of, not the average person, but the abnormal person—to deviate—who is likely to be its typical recipient. Indeed, there may be even more cause for regulation.

"obscenity" laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the "obscenity" laws do not seem best calculated to cope with him. Moreover, the Court stresses in *Roth* the "effect" of the material on the people reached by it. See 354 U. S. at 490.[12]

Of course, we are not asked to decide that Nutrix materials can in no case be a proper basis for exclusion from the mails nor, for that matter, for criminal convictions. Exclusion has already been decided. But while this discussion would be quite relevant to whether particular material alleged to be "obscene" may possibly be found to be beyond the scope of the First Amendment, it is also of central importance to the main problem in this case, which is one of proof and conviction. And if proof of prurient stimulation and response is generally important, it is particularly necessary when the prurient interest may be that of a deviant segment of society whose reactions are hardly a matter of common knowledge. It may well be that there are characters and cults to which exaggerated high heels, black patent leather bindings and bondage poses have some occult

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[12] It might be thought that the statute in question is concerned not so much with deterrence of sexually stimulated anti-social conduct as with use of the mails to disseminate unsolicited, undesired offensive materials to uninterested recipients. But the statute is not so narrowly drawn. Indeed, a bill more appropriately designed to cope with that precise problem was recently approved by the House of Representatives. The bill, H. R. 980, 89th Cong. 1st Sess., would permit a recipient or a parent of an infant recipient to return to his Postmaster any mail thought by the recipient to be "obscene, lewd, lascivious, indecent, filthy, or vile" and have the Postmaster notify the sender to discontinue the mailings; such an order would be judicially enforceable. Cf. *Lamont* v. *Postmaster General*, —— U. S. ——, —— n. 2 (1965). See generally Schwartz, *The Mail Must Go Through—Propaganda and Pornography*, 11 U.C.L.A. L. Rev. 805, 845-48 (1964).

significance, but we doubt that any court would take judicial notice of the reaction that deviates—or the average man—might have to such stimuli. However, some proof should be offered to demonstrate such appeal, thereby supplying the fact-finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion. As was observed earlier in Klaw's troubles with the postal censors, "obviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence." *Klaw* v. *Schaffer, supra,* 151 F. Supp. at 539 n. 6; see *Manual Enterprises, Inc.* v. *Day,* 289 F. 2d 455 (D. C. Cir. 1961, *rev'd,* 370 U. S. 478 (1962)).

In this case, although Judge Wyatt wisely suggested, and the Government considered, introduction of such evidence, there was none. Because of this Judge Wyatt stated at the end of the case, as he had to, that there was no "evidence from which the jury could find that it [Nutrix materials] would in fact appeal to the prurient interest of a particular class."

Furthermore, nothing in the record shows that the material even has prurient appeal to the average man. The parent witnesses did not react to Junior's new literary and pictorial delights in a prurient manner, nor did the other recipient witnesses. Junior was not called upon to describe the appeal (if any) to his prurient interest; he probably would not have understood what "prurient" meant any more than do his elders. Most of the witnesses testified that they found the material disgusting or revolting, but that lascivious and lecherous thoughts had not been aroused in them. It is not unlikely that many if not most witnesses and jurors would also consider "disgusting and revolting" more than a few of our current motion pictures, like "Dr. Terror's House of Horrors," many of the newsstand magazines so anomalously entitled "horror comics," the risque birthday, convalescent, and greeting cards found in almost

every corner drug store, as well as the scores of vulgar party favors. Indeed, vulgarity seems to be in vogue. But it is doubtful whether our jails would be well used if convictions were to be based on material that is just "disgusting and revolting." To do so would, we fear, be simply another application of the age-old double standard of the drawing room and the locker room.

If the witnesses presented in this case provide any sampling, these pamphlets and pictures stimulated no one's prurient interest. Although it may be difficult to find expert and other witnesses properly qualified to inform the jury about what does or does not appeal to the prurient interest of the average person, cf. *Klaw* v. *Schaffer, supra,* 151 F. Supp. at 539-40, it would not seem impossible. On the other hand, it is clear that jurors should not consider their own personal reactions as setting the standard; there is too much truth in the observation that "what is pornography for one man is the laughter of genius to another."[13] *Cf.* Ass'n of the Bar of the City of New York, Comm. on the Bill of Rights, *Report on H. R. 319, 88th Cong., 2d Sess. (1964), on "Morally Offensive Mail,"* in *Reports of the Ass'n of the Bar Concerned with Federal Legislation* 54, 56 (1965).

In this case, however, the only predicate for any conclusion about prurient appeal was the material itself, as if *res ipsa loquitur.* The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is "prurient appeal." Because the

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[13] D. H. Lawrence, *Pornography and Obscenity, in Sex Literature and Censorship,* 69 (Moore ed. 1953).

jury was given no basis for understanding exactly how and why the material appeals to its audience, whether deviate or average person, it may too readily supply an explanation—"prurient appeal." Even if the jury did not consist of twelve carefully selected Anthony Comstocks, it might well believe that the predominant appeal of certain acknowledged works of art, sculpture and literature found in all our well-known museums and libraries would be to the prurient interest of the average person, or perhaps someone else. But if that be so, can we allow the censor's stamp to be affixed on the basis of an uninformed jury's misconceptions? See also *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965).

Whatever the value of mere "autoptical" evidence in other contexts, it should not readily be countenanced in this area. Otherwise, too easily the Government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable. See, e.g., *Manual Enterprises, Inc.* v. *Day, supra,* 370 U. S. at 482; *Jacobellis* v. *Ohio, supra,* 378 U. S. at 191-92. Too easily the jury could aid suppression simply on the basis of speculations and suspicions about the prurient appeal of material to some unknown, undefined person whose psyche is not known. With the First Amendment in the background, this cannot be abided.

The state of the record gave the jurors impermissibly broad freedom to convict just because, having no more informative evidence than the material itself, they might think that the average person would "recognize" that the material has prurient appeal. But again, *to whom?* In this case, the jury had insufficient evidence even to "recognize" that the material appealed to the prurient interest of the average person. It had absolutely no evidentiary basis from which to "recognize" any appeal to the prurient

interest of the deviate or the typical recipient—a class never really defined in the record. Because there was insufficient evidence for the jury to consider Nutrix material "obscene" under any proper view of the *Roth* test, the motion for directed verdict of acquittal should have been granted.[14]

This result demonstrates perhaps that a second pronouncement may now be needed to clarify the rule of *Roth.* However, this court is mindful of the difficulties of providing an adequate definition, and it may turn out that the best and most realistic formulation available is that of Mr. Justice Stewart in *Jacobellis* that it is only "hard-core pornography" to which the Constitution's protection does not extend, and although it may be indefinable, "I know it when I see it . . ." 378 U. S. at 197. In any case, following *Roth* the censor's disapproving seal was removed from magazines for homosexuals and pictures of nudist camps in which the

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[14] Even with adequate proof under the average man test, there might still be problems, for the jury was charged to consider the material from the standpoint of the average man in the nation as a whole. We very much doubt whether twelve random New Yorkers can make such a judgment without being further informed about the "common conscience of the nation," if there be such a thing. In any case, we do not read the Court's plurality opinions in *Jacobellis* as unequivocal authority for the proposition. In announcing the Court's judgment, Justice Brennan was speaking only for himself and Justice Goldberg. Justices White, Black and Douglas concurred only in the judgment. Justice Stewart concurred without indicating adoption of the national community standard. As for the dissenters, the Chief Justice explicitly rejected the national standard, as did Justice Harlan, presumably, in light of his views in *Roth.* See *Gent* v. *State,* —— Ark. ——, —— S. W. 2d —— (1965). See also *Keney* v. *New York,* 34 U. S. L. Week 30 1 (New York, Monroe County Ct., 1964), *petition for cert. filed,* 33 U.S.L. Week 3231 (U. S. Dec. 29, 1964) (No. 793, 1964 Term; renumbered No. 39, 1965 Term); *Redrup* v. *New York,* 34 U. S. L. Week 3012 (New York, Sup. Ct., Dec. 17, 1964), *petition for cert. filed,* 33 U. S. L. Week 3341 (U. S. March 26, 1965) (No. 1073, 1964 Term; renumbered No. 72, 1965 Term).

campers are unemasculated by the censor's retouching brush. Through these and other breaches in the dike has swept a veritable flood, as each pamphlet, play or picture seems obliged to be even more candid or daring in order to stimulate the public's prurient palate and assure appearance on the best-seller list. Authors vie with each other to peer through keyholes and over transoms, and to hide themselves at advantageous listening posts in well-selected bedrooms. Their efforts are rewarded by their being able to depict sights and conversations concerning the most intimate phases of sexual activity, with or without the benefit of wedlock. Witness such books as "The Group," "Candy," and "Green Tree in Gedde," the last of which the reviewer in the stately New York Times says is "a mixture of existentialism and erotic prurience" apparently demonstrating "that young people in our tormented civilization are so lost in a wilderness of moral anarchy and philosophical despair that their only interest is in sex and in many of its most debased and perverted manifestations." May 3, 1965, p. 31, col. 3. And the commercial attributes of sexual candor have apparently not gone unnoticed by publishers of even the women's magazines. See Iversen, *The Pious Pornographers* (1965).

A comparison of judicial reactions to recent *causes célèbres* suggests that the judiciary in our tormented modern civilization are also lost in a wilderness. Before it obtained its imprimatur in *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (1964), Henry Miller's "Tropic of Cancer" was "obsence" in Florida and in New York, *People* v. *Fritch,* 13 N. Y. 2d 119, 192 N. E. 2d 713, 243 N. Y. S. 2d 1 (1963), but not in California, *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 31 Cal. Reptr. 800, 383 P. 2d 152, *cert. denied,* 375 U. S. 957 (1963), Massachusetts, *Attorney General* v. *The Book Named "Tropic of Cancer,"* 345 Mass. 11, 184 N. E. 2d 328 (1962), and Wisconsin, *McCauley* v. *Tropic of Cancer,* 20 Wis. 2d 134, 121 N. W. 2d 545 (1963). Similar con-

fusion and inconsistency is being manifested as to "Fanny Hill," which is "obscene" in Massachusetts, *Attorney General* v. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* —— Mass. ——, 206 N. E. 2d 403 (1965), but not in New York, *Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760, 252 N. Y. S. 2d 71 (1964). This is a book which any layman might not hesitate to say met all the requirements of *Roth.* The most amateur prosecutor could undoubtedly obtain a conviction in any part of the country in comparatively few minutes merely by reading a few pages to the jury. In fact, the same prosecutor might obtain the same result if he exhibited to the jury those glossy prints (mailed in plain envelopes) of quite naked ladies in various poses, despite the fact that they were photographs of famous pictures or statues in art museums. The possibility that deliberating jurors would be uncommonly sanctimonious or hypocritical seems quite obvious. Indeed, most if not all of the censor's defeats have come at the hands of appellate courts, and not the jury.

Many would doubt that a judicial system that puts its permissive stamp of approval upon such books as "Tropic of Cancer" and "Fanny Hill," to name a few, or certain magazines for homosexuals and sunbathers should then incarcerate or penalize these two defendants for disseminating and publicizing material which might or might not (there is no proof) appeal to someone's "prurient interest." Indeed, we can sympathize with Klaw's plight were he to find "Fanny Hill" or "Tropic of Cancer" in the prison library, or, if others had pre-empted the only copies, there were available "Pleasure Was My Business," see *Tralins* v. *Gerstein,* 378 U. S. 576 (1964), which contains "numerous descriptions of abnormal sex acts and indecent conversations supposed to have taken place in [a] Florida brothel." 32 U. S. L. Week 3048. As Chief Judge Desmond pointed out in his dissent in *Larkin,* "Fanny Hill" contains every element which might appeal to "prurient

interest." Judge Scileppi described the book, with considerable justification, as "one of the foulest, sexually immoral, debasing, lewd, and obscene books ever published, either in this country or abroad." *Larkin, supra,* 14 N. Y. 2d at 407, 200 N. E. 2d at 765, 252 N. Y. S. 2d at 78. If no books are available, Klaw together with the public might turn to stimulation through the auditory nerves rather than the optic nerves. The field is no less fruitful for now "Fanny Hill Comes Alive" in an unexpurgated two-record album, giving in 16 stunning scenes "all the lusty, intimate, climactic excitement of this erotic masterpiece . . . Banned for 200 years, now available following New York State Court of Appeals decision overruling the lower courts." So reads the advertising in the Book Review section of a recent Sunday New York Times, April 4, 1965. Thus, another item is added to the party-record list which for generations has delighted those who seek such entertainment with their lusty and ribald old English ballads, entertainment to which Robert Burns, to name one, was a not insubstantial contributor. And in the field of prose, see Mark Twain's "1601" and Samuel Pepys' "Diary." [15] Faced with this vast array of reading and listening matter available to the public, Klaw might understandably wonder as to the meaning of equal protection of law.

In judging the convictions of Klaw and Kramer against the many decisions of the Supreme Court and highest state courts, this court has been left with the definite impression, as indicated above, that there has been insufficient proof presented in this case to justify their penalties and imprisonment. For better or for worse, the standard of what does not arouse "prurient interest" has been established. A particularly careful study of the subject matter involved in this and other cases has been made because this court

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[15] See generally Kronhausen & Kronhausen, *Pornography and the Law,* 43-56, 79-92 (1959).

regards the material as revolting and disgusting. But it is the record and not our feelings that must control. Here the jury had no opportunity to judge the exhibits presented to them by any standard other than their own speculation as to "prurient interest." If they knew the standard set as a matter of law by other cases, their result might have been different. "Due process of law" would be a meaningless cliche if the nonsensical trash that is the subject of this prosecution were allowed to be the basis of a conviction by judge or jury without any proof demonstrating that it has the proscribed effect on any of our citizenry.

The courts may have opened the floodgates for horror and filth, but if they are to be closed it should be done by the careful drafting of proper laws by our duly elected representatives, and not by a combination of zealous governmental inspectors, prosecutors, and uninformed juries. Then the potential contributors to our culture may have some slight notion of the guidelines and the risks. Of course, it is quite possible that after the public is sated with the products of the new permissiveness the floodtide will ebb of its own diminished momentum. Until then, however, the responsibility of protecting defendants from unguided suppression and conviction weighs as heavily upon this court as it does upon the Supreme Court. While there is some merit to the opinion of those who say that appellate courts should not have to sit as a board of censors supervising the work of the police, the motion picture censorship bureaus, the schools, the churches, and the other organizations that have their lists of good and bad books and motion pictures, there is even more merit to the view that once these preferences are enforced upon others, we "cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis, supra,* 378 U. S. at 190. Unless there be this protection, a

witch hunt might well come to pass which would make the Salem tragedy fade into obscurity. Having in mind the alternatives of jail or freedom, courts must be aware of the facts of the "held-not-to-be-obscene" or "approved" cases, and ensure that the proof is sufficient to allow a fact finder to set this case apart from them. Otherwise it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: "Would you want your son or daughter to see or read this stuff?" A conviction in every instance would be virtually assured.

Finally, to take Mr. Justice Brennan's concluding words in reversing the court below in *Jacobellis* v. *Ohio, supra,* 378 U. S. at 196: "We have viewed the film [the exhibits], *in the light of the record made in the trial court,* and we conclude that it is [they are] not obscene within the standards enunciated in *Roth* v. *United States* and *Alberts* v. *United States* . . ." and implicit in the many other decisions of the Supreme Court. (Emphasis added.)

Reversed.

## SUBJECT INDEX


Page

Interest of amicus curiae ..... 1

Statement of the case ..... 2

Summary of argument ..... 17

Argument ..... 19

I.

The words "sadistic" and masochistic" are synonymous with the word "obscene" as those words are used in Section 1141 of the Penal Law and were so construed by prosecutor Stein and the Trial Court ..... 19

II.

The construction of Section 1141 of the Penal Law, adopted by the New York Court is binding on this Court ..... 22

III.

The "Scienter" Test, "Knowledge of the Contents of the Books", established in the Finkelstein case satisfies the constitutional requirement in Smith v. California. Appellant's activities do not place him in the caveated area of "honest mistake." ..... 24

IV.

The sado-masochistic books are not "protected materials." They promote lust and portray filth for its own sake. They are "dirt for dirt's sake." Appellant's conduct in disseminating them is criminal ..... 31

V.

Page

Section 1141 of the Penal Law is not vague ..... 51

VI.

The book exhibits were not seized in violation of the First and the Fourth Amendments ..... 52

A. Appellant waived the production of officer Dimler for examination as to the adequacy of the search warrant ..... 52

B. Norman Levenberg, the printer was in possession of the books at 37 West 20th Street and Consented to the search ..... 54

C. The seizures from the publisher's outlet, Midget Book Store and Main Stem Book Store were incident to a lawful arrest and were not dependent upon the procurement of a search warrant ..... 55

D. Counts 110 and 159 are not involved in the search and seizure issue ..... 56

Conclusion ..... 56

Appendix A. The Female Sultan .....App. p. 1

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Alberts v. United States, 354 U.S. 476 | 35, 38, 43, 44, 47, 48, 51 |
| A Quantity of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 | 45, 46, 55 |
| Astore v. United States, 288 F. 2d 26, cert. den. 366 U.S. 925, 81 S. Ct. 1352, 6 L. Ed. 2d 384 | 39 |
| Butler v. Michigan, 352 U.S. 80 | 38 |
| Cain, Robert H. v. United States, 276 F. 2d 598, cert. den. 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 | 38 |
| California v. Glatman, 340 P. 2d 8 | 49 |
| California v. Williamson, 207 Cal. App. 2d 839, cert. den., 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047, rehear. den., 85 S. Ct. 13, 13 L. Ed. 2d 77 | 50 |
| Chicago v. Doe, 47 Ill. App. 2d 460, 197 N.E. 2d 711 | 31 |
| Chobot, Joseph v. Wisconsin, 12 Wis. 2d 110, 106 N.W. 2d 286, app. dis. 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85, reh. den., 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 | 39 |
| Collier, Frank L. v. United States, 283 F. 2d 780, cert. den. 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 | 38 |
| Connecticut v. Andrews, 150 Conn. 103, 186 A. 2d 546 | 31, 42 |
| Connecticut v. Sul, 146 Conn. 78, 147 A. 2d 686 | 36 |
| Curl's case, 2 Stra. 788 (1727) | 23 |

Page

Darnell, John, III v. U.S., 316 F. 2d 813, cert. den., 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155, rehear. den., 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 ..... 34, 40

Duskill v. U.S., 281 Fed. 140 ..... 55

Finkelstein v. U.S., 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 ..... 6

Finkelstein, Louis, et al. v. New York, 229 N.Y.S. 2d 367, 183 N.E. 2d 661, cert. den., 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 ..... 40

Fried, Harry v. New York, 238 N.Y.S. 2d 742, rev'd, 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 ..... 41

General Trust Company v. Blodgett, 287 U.S. 509.... 23

Goldstein, Arthur v. Virginia, cert. den., 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 ..... 40

Heinecke, Alfred J. v. United States, 294 F. 2d 727, cert. den., 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 ..... 39

Illinois v. Sikora, .... Ill. ...., 204 N.E. 2d 768 .... 31

Hook v. State, 15 Misc. 672, 181 N.Y.S. 2d 621 ..... 54

Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1673 ..... 36, 38, 42, 45

Kahm, Harold S. v. U.S., 300 F. 2d 78, cert. den. 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 ..31, 40

Kingsley Books Inc., et al. v. Brown, 1 N.Y. 2d 177, 134 A. 2d 461, 151 N.Y.S. 2d 639, aff'd. 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 ..... 22, 23, 33, 36

Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 ..... 23

Page

Lanzetta v. New Jersey, 306 U.S. 451 .....23, 24

Lessard, In re 62 Cal. 2d ....., 42 Cal. Rptr. 583, 399 P. 2d 39 ..... 55

Manual Enterprises, Inc. v. Day, 370 U.S. 478, 8 L. Ed. 2d 639, 82 S. Ct. 1432 ..... 45

Marcus v. Kansas City Search Warrants, 367 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708 .....45, 55

Matthews, John G. v. Florida, 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 ..... 38

Mishkin, Edward v. U.S., 317 F. 2d 634, cert. den., 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 .... 40

Missouri v. Vollmar, .... Mo. ...., 389 S.W. 2d 20.... 31

Monfred, Harry et al. v. Maryland, 226 Md. 312, 173 A. 2d 173, cert. den. 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 ..... 39

Nash v. U. S., 229 U.S. 373 .....29, 52

Nebraska v. Jungclaus, 176 Neb. 641, 126 N.W. 2d 858 ..... 31

New Jersey v. Hudson County News Co., 41 N.J. 247, 196 A. 2d 225 ..... 31

N.Y. v. Birch, et al., 40 Misc. 2d 626, 243 N.Y.S. 2d 525 ..... 43

N. Y. v. Edward Mishkin, 17 A. 2d 243, 234 N.Y.S. 2d 342 .....16, 34

N. Y. v. Edward Mishkin, 26 Misc. 2d 152 ....16, 34

N.Y. v. Finkelstein, 9 N.Y. 2d 342, 174 N.E. 2d 470 ..... 24

N.Y. v. Finkelstein, 28 Misc. 2d 771, 218 N.Y.S. 2d 341 ..... 56

Page

N. Y. v. Finkelstein and Schaeffer, 11 N.Y. 2d 300, 229 N.Y.S. 2d 367 .....6, 25, 26, 31, 33, 34

N. Y. v. Herman H. Schenkman, 195 N.Y.S. 2d 570 ..... 6

N. Y. v. Kingsley Books, Inc., Louis Finkelstein, dba Times Book Store, et al., 208 Misc. 150, 142 N.Y.S. 2d 735 ..... 22

N.Y. v. Matherson, 16 N.Y. 2d 509 ..... 56

N.Y. v. Peskin, 16 N.Y. 2d 511 ..... 56

Ohio v. Mazes, 3 Ohio App. 2d 90 ..... 31

Padell, Max v. United States, 262 F. 2d 357, cert. den. 359 U.S. 942, 79 S. Ct. 723, 3 L. Ed. 2d 676 ..... 38

Parr, Wyman Hulan v. United States, 255 F. 2d 86, cert. den. 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 ..... 38

People v. Coffey, 11 N.Y. 2d 142, 227 N.Y.S. 2d 412, 182 N.E. 2d 92 ..... 54

People v. Goldman, 197 Misc. 290, 94 N.Y.S. 2d 535 ..... 35

People v. Hay, et al., 245 N.Y.S. 2d 705..... 33

People v. Hay, 258 N.Y.S. 2d 238 ..... 34

People v. Herk, 44 N.Y.S. 2d 444 ..... 35

People v. Kalnin, 189 N.Y.S. 359 ..... 54

People v. Loria, 10 N.Y. 2d 368, 223 N.Y.S. 2d 462, 179 N. E. 2d 478 ..... 53

People v. Morganstern, 134 Misc. 127, 234 N.Y.S. 2d 11 ..... 35

People v. O'Neill, 11 N.Y. 2d 148, 227 N.Y.S. 2d 416, 182 N.E. 2d 95 ..... 54

Page

People v. Wade, 12 N.Y. 2d 61, 236 N.Y.S. 2d 36, 187 N.E. 2d 111 ..... 54

People v. West, 12 N.Y. 2d 1090, 230 N.Y.S. 2d 159 ..... 54

People v. Yarmosk, 11 N.Y.S. 2d 397, 230 N.Y.S. 2d 185 ..... 54

People on Complaint of Sumner v. Dial Press, 182 Misc. 416, 48 N.Y.S. 2d 480 .....21, 23

Rosen v. U.S., 161 U.S. 606 .....28, 29

Roth v. United States, 354, U.S. 495, 77 S. Ct. 1314 .....28, 35, 36, 38, 43, 44, 47, 48, 49, 51

Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 .....18, 24

State v. Andrews, 186 A. 2d 546 ..... 37

Tenney v. Liberty News Distributors Inc., 13 A. 2d 769, 215 N.Y.S. 2d 661 ..... 22

Tyomies Publishing Co. v. U. S., 211 Fed. 385 ....29, 52

United States v. Roy A. Oakley, 290 F. 2d 517, cert. den. 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87, rehear. den., 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 .....30, 31, 39

United States v. Samuel R. Hochman, 277 F. 2d 631, cert. den. 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61, rehear. den., 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 .....30, 38

Wenzler, Harold Eugene, Sr., and Imlay, John v. California, 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047, rehear. den., 85 S. Ct. 14, 13 L. Ed. 2d 77 .....41, 42

Page

Williamson, Samuel Dodd v. California, 24 Cal. Rptr. 734, cert. den., 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047, 85 S. Ct. 13, 13 L. Ed. 2d 77 ..... 41

Wisconsin v. Chobot, 12 Wisc. 2d 110, 106 N.W. 2d 286, app. dis., 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85, rehear. den. 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 ..... 31

Womack, Herman v. United States, 294 F. 2d 204, cert. den. 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 ..... 39

Zap v. U.S., 328 U.S. 624 ..... 54

Zucker, Harold v. New York, 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 ..... 40

Zuideveld, Nirvana Ward v. U.S., 316 F. 2d 873, cert. den., 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 ..... 41

Dictionary

Webster's Collegiate Dictionary, Fifth Edition ..... 19, 20, 22

Statutes

American Law Institute, Model Penal Code (1957), Sec. 207.10 ..... 37

New York Criminal Procedure, Sec. 22a ..... 22

New York General Business Law, Sec. 330 ..... 7

New York General Business Law, Sec. 330(2) ..... 16

New York General Business Law, Sec. 331 ..... 7

New York Penal Law, Sec. 1141 ..... 17, 18, 21, 22, 24

New York Penal Law, Sec 1141(1) ..... 7

Page

United States Code, Title 18, Sec. 1461 ..... 34

United States Constitution, First Amendment ....2, 18

United States Constitution, Fourteenth Amendment 18

Textbooks

Kilpatrick, James Jackson, The Smut-Peddlers (1960), pp. 37, 67, 123, 218 ..... 4

Kilpatrick, James Jackson, The Smut-Peddlers (1960), pp. 98-218 ..... 2

Los Angeles Daily Journal Report Section, Part 3, p. 14 ..... 43

45 Minnesota Law Review, pp. 5, 24, footnote 102 .. 35

40 Notre Dame Lawyer (Dec. 1964), p. 1 ..... 43

Supreme Court Practices, Third Edition, Stein and Grossman, pp. 182-183 ..... 42

IN THE

# Supreme Court of the United States

October Term, 1965
No. 49

EDWARD MISHKIN,

*Appellant,*

*vs.*

STATE OF NEW YORK,

*Appellee.*

**On Appeal From the Court of Appeals of the State of New York.**

**Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.**

## Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience amicus curiae is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the court-room in support of the people's case.

Mishkin v. New York is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

**Statement of the Case.**

On Dec. 29, 1959, police officers visited a book store known as Publisher's Outlet, located at 254 West 42nd Street, New York. There they confiscated 201 copies of 25 different books[1] and placed the man in

[1]A single copy of each of the 25 books was identified and admitted into evidence as Exhibits 43-67. The titles identify the materials as predominantly "sado-masochistic" in nature. See "The Smut-Peddlers," by James Jackson Kilpatrick, 1960, published by Avon in paperback form by arrangement with Doubleday and Co., pp. 98-218. The titles, number of copies seized and nature of the count filed are shown below. The trial court found appellant guilty on all counts, except as noted. (N.G.) indicate "not guilty." (R) indicates "guilty," but reversed on appeal.

charge and two others on the premises under arrest [R. 157].

On the same day, the police visited a second book store in the area, known as the Midget Book Shop, located at 228 West 42nd Street. There they confis-

| Exhibit | Book Title and Number of Copies Seized | —COUNTS IN INFORMATION— Possession | Publishing | Hiring Others | Gen. Business Law No Identification of Publisher and Printer |
|---|---|---|---|---|---|
| 43 | Columns of Agony (5) | 37 | 95 | 144 | 192(R) |
| 44 | The Tainted Pleasure (1) | 38 | 96 | 145 | 193(R) |
| 45 | Intense Desire (5) | 39 | 97 | 146 | — |
| 46 | The Hours of Torture (20) | 40 | 76 | 124 | 173(R) |
| 47 | Bound In Rubber (17) | 41 | 77 | 125 | — |
| 48 | Arduous Figure Training at Bondhaven (25) | 42 | 78 | 126 | — |
| 49 | Return Visit to Fetterland (2) | 43 | 79 | 127 | — |
| 50 | Women In Distress (4) | 44 | 81 | 129 | — |
| 51 | Pleasure Parade No. 4 (4) | 45 | 85 | 133 | — |
| 52 | Pleasure Parade No. 3 (6) | 46 | 84 | 132 | — |
| 53 | Pleasure Parade No. 2 (6) | 47 | 83 | 131 | — |
| 54 | Pleasure Parade No. 1 (8) | 48 | 82 | 130 | — |
| 55 | Sorority Girls Stingent Intiation (18) | 49 | 98 | 147 | — |
| 56 | Terror At The Bizzare Museum (14) | 50 | 99 | 148 | — |
| 57 | Screaming Flesh (10) | 51 | 86 | 134 | 174(R) |
| 58 | Fury (3) | 52 | — | — | — |
| 59 | Masque (2) | 53 | 88(N.G.) | 136(N.G.) | 176(N.G.) |
| 60 | Temptation (8) | 57 | 100(N.G.) | 149(N.G.) | 194(N.G.) |
| 61 | Peggy's Distress On Planet Venus (6) | 58 | 101 | 150 | — |
| 62 | Ways of Discipline (8) | 59 | 102 | 151 | — |
| 63 | Mrs. Tyrants Finishing School (2) | 60 | 103 | 152 | — |
| 64 | Perilous Assignment (9) | 61 | 104 | 153 | — |
| 65 | French Girl on the Stairs, Part 2 (6) | — | — | — | 184(N.G.) |
| 66 | Tattletales (1) | — | — | — | 186(R) |
| 67 | Look At Her Motor Turn Over (1) | — | — | — | 187(R) |

cated 10 copies of one book[2] [R. 151]. The man in charge, William Schenkman was placed under arrest [R. 160].

On Jan. 12, 1960 (14 days later) a search warrant was issued by the Felony Branch of the Magistrates Court of New York County to search the premises at 37 West 20th Street, New York [R. 135]. In executing the search warrant 16,859 copies of 42 different titles[3] were confiscated from a basement storage bunker, approximately 25 ft. x 30 ft. x 12 ft. high, located at that address.

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[2]A single copy was identified and admitted into evidence as Exhibit 68. The title identifies the material as "sado-masochistic—bondage." See "The Smut Peddlers, *supra*, at pp. 37, 67, 123, 218. The title, number of copies seized and nature of the count filed are shown below. The trial court found appellant guilty on both counts.

| | | —COUNTS IN INFORMATION— | | | |
|---|---|---|---|---|---|
| Exhibit | Book Title and Number of Copies Seized | Possession | Publishing | Hiring Others | Gen. Business Law No Identification of Publisher and Printer |
| 68 | Bondage Correspondent (10) | — | 107 | 156 | — |

[3]A single copy of each of the 42 books was identified and admitted into evidence as Exhibits 1-42. The titles identify the materials as predominantly "sado-masochistic." The titles, number of copies seized, and nature of the count filed are shown below. The trial court found appellant guilty on all counts, except as noted: (N.G.) indicates "not guilty"; (R) indicates "guilty," but reversed on appeal.

| | | —COUNTS IN INFORMATION— | | | |
|---|---|---|---|---|---|
| Exhibit | Book Title and Number of Copies Seized | Possession | Publishing | Hiring Others | Gen. Business Law No Identification of Publisher and Printer |
| 1 | Chances Go Around (158) | 1 | 63 | 111 | 160(R) |
| 2 | Impact (184) | 2 | 64 | 112 | 161(R) |
| 3 | Female Sultan (273) | 3 | 65 | 113 | 162(R) |
| 4 | Satin Satelite (300) | 4 | 66(N.G.) | 114(N.G.) | 163(N.G.) |
| 5 | Her Highness (1466) | 5 | 67 | 115 | 164(R) |
| 6 | Mistress of Leather (9) | 6 | 68 | 116 | 165(R) |
| 7 | Educating Edna (35) | 7 | 69 | 117 | 166(R) |
| 8 | Strange Passions (200) | 8 | 70 | 118 | 167(R) |
| 9 | The Whipping Chorus Girls (35) | 9 | 71 | 119 | 168(R) |

On Dec. 30, 1958, just one year prior to the above police actions, a New York detective had visited the first of the above book stores (Publisher's Outlet) where he purchased a copy of "Queen Bee." At that time he seized 21 copies of the same book [R. 164] and arrested the

| | | | | | |
|---|---|---|---|---|---|
| 10 | Order of the Day and Bound Maritally (85) | 10 | 72 | 120 | 169(R) |
| 11 | Dance With The Dominant Whip (225) | 11 | 73 | 121 | 170(R) |
| 12 | Cult of the Spankers (55) | 12 | 74 | 122 | 171(R) |
| 13 | Confessions (23) | 13 | 75 | 123 | 172(R) |
| 14 | The Hours of Torture (650) | 14 | 76 | 124 | 173(R) |
| 15 | Bound In Rubber (406) | 15 | 77 | 125 | — |
| 16 | Arduous Figure Training at Bondhaven (515) | 16 | 78 | 126 | — |
| 17 | Return Visit to Fetterland (430) | 17 | 79 | 127 | — |
| 18 | Fearful Ordeal in Restraintland (150) | 18 | 80 | 128 | — |
| 19 | Women In Distress (215) | 19 | 81 | 129 | — |
| 20 | Pleasure Parade No. 1 (1380) | 20 | 82 | 130 | — |
| 21 | Screaming Flesh (35) | 21 | 86 | 134 | 174(R) |
| 22 | Fury (626) | 22 | — | — | — |
| 23 | So Firm So Fully Packed (415) | 23 | 87 | 135 | 175(R) |
| 24 | I'll Try Anything Twice (66) | 24 | — | — | — |
| 25 | Masque (870) | 25 | 88(N.G.) | 136(N.G.) | 176(N.G.) |
| 26 | Catanis (206) | 26 | — | — | — |
| 27 | Violated Wrestler (315) | 27 | 89 | 137 | 177(R) |
| 28 | Betrayal (85) | 28 | — | — | — |
| 29 | Swish Bottom (57) | 29 | 90 | 138 | 178(R) |
| 30 | Raw Dames (208) | 30 | 91 | 139 | 179(R) |
| 31 | The Strap Returns (50) | 31 | 92 | 140 | 180(R) |
| 32 | Dangerous Years (115) | 32 | 93 | 141 | 181(R) |
| 33 | Run Girl, Run Hard (160) | — | — | 142(N.G.) | — |
| 34 | This Way Down (59) | — | — | — | 182(R) |
| 35 | The French Girl on the Stairs, Part 1 | — | — | — | 183(N.G.) |
| 36 | The French Girl on the Stairs, Part 2 (224) | — | — | — | 184(N.G.) |
| 37 | Smooth and Sassy (2170) | — | — | — | 185(R) |
| 38 | Tattletales (1485) | — | — | — | 186(R) |
| 39 | Look At Her Motor Turn Over (359) | — | — | — | 187(R) |
| 40 | Sex Switch (1900) | — | — | — | 188(R) |
| 41 | The Hollywood Spankers (320) | — | — | — | 189(R) |
| 42 | Anecdotia Spankiana (340) | — | — | — | 190(R) |

seller, Herman Schenkman [R. 166]. Thereafter Herman Schenkman was tried on a charge of violating the obscenity laws in connection with his sale of "Queen Bee." On January 25, 1960 the Court of Special Sessions of the City of New York found Schenkman guilty of the obscenity charge.[4]

On Feb. 10, 1960, the police visited a third book store, known as the Main Stem Book Store, located at 1607 Broadway, New York. There they confiscated 17 copies of three books.[5] [ R. 154]. The record does not

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[4] *N. Y. v. Herman H. Schenkman,* 195 N.Y.S. 2d 570 (Jan. 25, 1960). See also *N. Y. v. Nathan Goldstein, N. Y. v. Lewis Schaeffer* and *N. Y. v. Joseph Kleinberg and Louis Finkelstein,* reported in the same decision. The *Schaeffer* and *Finkelstein* cases similarly involved the sale of "Queen Bee." In *N. Y. v. Finkelstein and Schaeffer,* 11 N.Y. 2d 300, 229 N.Y.S. 2d 367 (May 17, 1962), the New York Court of Appeals held "Queen Bee" obscene and affirmed the convictions of Finkelstein and Schaeffer. The Supreme Court of the United States denied a writ of certiorari in *Finkelstein v. U.S.,* 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962). Only Justice Douglas voted to grant certiorari. The 22 copies of "Queen Bee" seized in the *Schenkman* case (*supra*) were identified and admitted into evidence at appellant's trial as Exhibits 72 and 72,[1] relating to counts 110, 159 and 198. No search and seizure issue can be raised as to Exhibit 72 and its admissibility in evidence is beyond question. The trial court's findings were "guilty" on all counts. (R) indicates "guilty," but reversed on appeal.

| | | —COUNTS IN INFORMATION— | | | |
|---|---|---|---|---|---|
| Exhibit | Book Title and Number of Copies Seized | Possession | Publishing | Hiring Others | Gen. Business Law [ No Identification of Publisher and Printer ] |
| 72 | Queen Bee | — | 110 | 159 | 198(R) |

[5] A single copy of each of the 3 books was identified and admitted into evidence as Exhibits 69-71. The titles, number of copies seized, and nature of the count filed are shown below. The trial court found appellant guilty on all counts. (R) indicates "guilty," but reversed on appeal.

| | | —COUNTS IN INFORMATION— | | | |
|---|---|---|---|---|---|
| Exhibit | Book Title and Number of Copies Seized | Possession | Publishing | Hiring Others | Gen. Business Law [ No Identification and Printer ] |
| 69 | Woman Impelled (11) | — | 106 | 155 | — |
| 70 | Eye Witness (1) | — | 108 | 157 | 196(R) |
| 71 | Stud Broad (5) | — | 109 | 158 | 197(R) |

reflect what person(s) were arrested at the time of the seizure.

Testimony was presented to the Grand Jury and thereafter, on March 8, 1960, the District Attorney at the direction of the Grand Jury, filed an information, charging the defendant-appellant with the following:

*Counts 1 to 62 inclusive,* with possession with intent to sell, of a number of books alleged to be "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting." On the motion of the People, Counts 33, 34, 35, 36, 54, 55, 56 and 62, were dismissed before the trial.

*Counts 63 to 110 inclusive,* with publishing, manufacturing and preparing a number of books alleged to be within the proscription of subdivision 1 of Section 1141 of the Penal Law. On the Motion of the People, Counts 94 and 105 were dismissed before trial.

*Counts 111 to 159 inclusive,* with unlawfully hiring, employing, using and permitting other persons to design, print, utter, publish, manufacture and prepare a quantity of books alleged to be within the proscription of subdivision 1 of Section 1141 of the Penal Law. On the motion of the People, Counts 143 and 154 were dismissed before trial.

*Counts 160 to 198 inclusive,* with failing to imprint the true name and address of the publisher or printer on the books described in those Counts, in violation of Sections 330 and 331 of the General Business Law. On the motion of the People, Counts 191 and 195 were dismissed before trial.

The People called twenty-two witnesses, including two printers, three writers, two artists, a typing service operator, two book binders, the accountant for "Publisher's Outlet" and a retail store owner, buying from appellant at wholesale.

Norman Levenberg, a printer, testified as follows: He had known Mr. Mishkin, the appellant for about twelve years [R. 174]. He identified exhibits 1 through 72 [R. 200-251] and said that he had printed all, except exhibits 31, 32 and 33, at the request of appellant [R. 175]. Appellant's work represented ¾ of his total printing work. Appellant paid in cash and would not give him a bill [R. 300].

The procedure was as follows [R. 179]; Appellant would call him to his store and hand him either a typed manuscript or a previously printed book. In the case of a manuscript he would give the same to a typesetter, Dorothy Yeeto [R. 253], who would set the type. After the type was set, he would photograph the pages, strip the negatives into a book form and print the same on flat sheets. He would then give the flat sheets to either York Bindery or Hudson Bindery [R. 253] who would make it up into a book. In the case of a previously printed book he would pull the book apart, photograph the pages and go through the same procedure [R. 180]. Appellant would give him the drawings for the cover [R. 255-272] and tell him what price to put on the cover [R. 180]; being, 3.50, 5, 6, 10 and 15 dollars per copy. Appellant told him the books had to have a publisher's name and address on the back and that he should make up any name and address. He never put appellant's name on the books [R. 181]. He printed between 1000 and 3500 copies of each of

the exhibits between March 1958 and March 1960, and identified the approximate number printed and the printing date [R. 200-251].

After he finished each printing job he would take 50 books to the Publisher's Outlet and 50 books to the Midget Book Shop [R. 182] and the rest of the books would go into a warehouse [R. 182]. He would then get paid by appellant [R. 192]. He was paid 40 cents for a thick book and 15-20 cents for a thin one [R. 193].

About the middle of 1958 at appellant's request he got a new warehouse in Room 908 at 37 West 30th Street, New York, where the books were stored thereafter [R. 185]. His printing business was on the 10th floor in the same building [R. 313]. Although his name was on the lease, appellant would give him $100.00 in cash at the beginning of each month, which he would give to the landlord. He had control of the warehouse [R. 279] and maintained it until November 1959.

Appellant would give him orders on a slip of paper, which he would fill from material in the warehouse and deliver to appellant at a number of stores in the neighborhood. Nine out of ten times this would be the Publisher's Outlet. He would also ship some out of town for appellant [R. 254]. Exhibits 73 A-C in Appellant's handwriting were the last slips of paper with orders given him by Appellant [R. 273] and were given to him in October of 1959 [R. 345]. In October 1959 appellant called him on the phone and told him not to fill the last order and to come down to the store, which he did the next day. At the store, appellant told him not to go near the warehouse because it was hot

[R. 275] and was under surveillance [R. 318]. A week later appellant told him to get rid of everything in the shop [R. 275] and to get the books out if he could [R. 371]. He was pretty nervous because his name was on the lease and so, at the first chance (Nov. 1959), he got the books out of Room 908 and into the basement of the same building at 37 West 20th St. [R. 188]. This was with the consent of the superintendent of the building [R. 365]. The move to the basement was his idea [R. 371].

He rented a store on McDonald Avenue in Brooklyn and began removing the books from the basement, a carton or two at a time to avoid detection. He gave the key to the appellant. He got about ¾ of the books out and ran out of money [R. 314]. He paid about 600 or 700 dollars to the superintendent and porter to move and store the books in the basement and appellant gave him a couple of hundred dollars toward it [R. 367].

He was first contacted by the police by phone the week before New Years[6] and met them the next day in his attorney's office [R. 337]. A couple of weeks later, on January 12, he told the police he would cooperate with them [R. 339], and met them at the building the day they executed the search warrant [R. 363].

Paul Hayman, a printer testified as follows: He had known Mr. Mishkin, the appellant for about eight years. He identified exhibits 31 and 32 as books which he had printed at the request of the appellant in 1959 and delivered to him at the Publisher's Outlet. He printed

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[6]The week before New Years would be on or about the date of the first confiscation, which occurred on December 29, 1959. See page 2.

about 300 copies and was paid .40 a copy for printing and binding [R. 373-380].

Hyman Rosen, a writer, testified that he had known the appellant since the fall of 1954 and wrote several booklets for him and his former partner [R. 395]. He identified[7] exhibits 24, 35 and 36 as having been written by him for appellant. He was paid in cash at the Publisher's Outlet [R. 396-399].

Leotha Hackshaw, a writer, testified she had known the appellant about three of four years [R. 408]. She identified[8] exhibits 26 and 25 as having been written

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[7]Hyman Rosen testified as follows: He had been a writer for 20 years and had written poetry, published a travel book, done fiction, journalism, articles and book reviews for the "New York Times." [R. 395]. He used the pseudonyms John Thomas for Exhibit 24, Colin Ross for Exhibits 35 and 36 and signed a contract with the appellant for the sale of Exhibits 35 and 36, as Harry Roshalenko, in which he stipulated that his name should not appear as the author [Ex. 75]. Appellant described to him what he wanted: Re Exhibit 24: He told appellant that he had a little novel at home. Appellant told him to spice it up and bring it in, which was exactly what he did [R. 396].

[8]Leotha Hackshaw testified as follows: She had written novels, pocket novels and television scripts. She wrote both books under the pseudonym Shaw Lee. Appellant described to her what he wanted: Re Exhibit 26: He wanted "a book in which there were lesbian scenes, the sex had to be very strong, it had to be rough, it had to be clearly spelled out. In other words, I couldn't be subtle about it; I had to write sex very bluntly, make the sex scenes very strong . . ." ". . . he wanted scenes in which women were making love with women, and that sort of thing . . ." [R. 411] ". . . he said he wanted sex scenes . . . in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men making love to men, and there was spankings and scenes—sex in an abnormal and irregular fashion . . ." [R. 412]. Re Exhibit 25: "He indicated he wanted something with—in this book he wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong . . ." [R. 414].

She did her research at home using, "Sexual Anomalies, Compilations of Case Histories of Lesbians," by Capio and a book by Kraft-Ebling [R. 416, 417]. It took her 3 months on the first book because it took more research and only about a month for the others [R. 417, 418].

by her for appellant [R. 409, 414]. Appellant paid her $200 in cash at the Publisher's Outlet for Exhibit 26 [R. 411, 413].

Kenneth Johnson, a writer, testified he had known the appellant since March of 1955 [R. 425-426]. He identified[9] the following exhibits as having been written for appellant, for the sums indicated: Exhibit 1—

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[9]Kenneth Johnson testified as follows: He had been a writer for 10 years and was presently writing novels and short stories. He had a bachelors degree from Langston University in Langston, Oklahoma and a M.A. degree from Wichita University in Wichita, Kansas, majoring in English and modern languages [R. 425-426]. Appellant described to him what he wanted: Re a four book series: "I want you to write four books with a strong lesbian theme . . ." [R. 428]. Re Exhibit 3: "This is a book that's based on 'House of Dolls' . . . Mr. Mishkin gave me the book . . . I do not know who wrote the 'House of Dolls' . . . I write very fast, and it was approximately a week before I turned the manuscript in to him . . . He wanted a book written on female domination . . ." [R. 431-433]. Re Exhibit 5: "He gave me an unbound book that he wanted me to extend. He wanted me to put a story line behind it and extend it. He wanted me to deal very graphically with the implementation of wheels on a female's body, of the darkening of the flesh under flagellation, and he said that the people who read these kinds of books didn't care particularly about sex. He wanted me to concentrate mostly on the changing of the color of the flesh when people were being flagellated and he didn't want any blood in it . . ." [R. 434]. Re Exhibit 22(58): "He wanted them to have a strong lesbian theme bearing on a hardback book that I had written called 'Mavis' by Vixen Press . . ." [R. 436]. Re Exhibit 27: "Mr. Mishkin gave me a book that was printed in California about lady wrestlers . . . There was no story line to the book that he gave me, but I took it home, and I read it; and I put a story line behind it and let the girl be raped . . ." [R. 438]. Re Exhibit 30: "Mr. Mishkin gave me eight pictures, and he told me he wanted a story line built around these eight pictures . . . I did it in two days . . ." [R. 441]. Re Exhibit 43: ". . . he told me practically the same thing that he had told me about other books that he wanted on flagellation, not too much sex, that the people were more—the people who buy this book were more interested in the reddening of the flesh and in no blood being let because he wanted not too much violence and in—in wheels appearing on the bodies of the victims because this is what the people who bought these books wanted . . ." [R. 446]. Re Exhibit 60: "He wanted a strong lesbian theme, a book similar to 'Mavis' or 'Fast Curve . . ." [R. 447].

$37; 2—$200; 3—$350; 5—$300; 21(57)—$45; 22-(58)—$225; 23—$100; 27—$100; 28—$220; 29—$100; 30—$150; 32—$165; 33—X; 34—$75; 39(67)—$100; 43—$300; 44—$100; 60—$220; 69—$200; 70—X; 71—$300; 72—$200. He was paid by appellant in cash at either the Main Stem Book Store or the Publisher's Outlet, except that one payment was made at Kingsley Book Store and one at Dinos [R. 427-455].

Ernest Stanton, an artist, testified he had known the appellant since 1955 or 1956 [R. 478]. He identified[10] certain illustrations appearing in exhibits 1, 21, 23, 25, 30, 37 and 71 as having been drawn by him for appellant. He delivered the drawings to appellant at the Publisher's Outlet and was paid $15-$25 in cash per illustration [R. 477-490].

Gene Bilbrew, an artist, testified he had known the appellant since 1954 or 1955 [R. 531]. He identified[11]

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[10]On direct examination at R. 484-485:

Stein: Did he say anything to you when he handed you the script?

Stanton: Yes, he did.

Justice Breslin: He did say something to you?

Stanton: Yes. He said, "Make them sexy, I mean, so that they would be selling—saleable."

Stein: Well, did he tell you what to do with the script?

Stanton: "Read the script; illustrate the story."

[11]On direct examination, at R. 539:

Justice Gassman: Well, how did you know what sort of a cover to put on this without reading the book?

Bilbrew: Well, let's say I would—I, more or less, learn the psychology of the type of work, what's appealing—

Justice Glassman: Psychology of what type of work?

Bilbrew: The work that's here.

On cross-examination, at R. 542:

Kern: Do you recall the type of psychology that was portrayed in that book?

Bilbrew: It was to specify a girl that wore corsets, high-heeled shoes, boots etc.

Kern: Yes; and that's what you meant a while ago when you said that you were familiar with this type of psychology.

certain illustrations appearing in Exhibits 4, 22, 24, 26, 28, 29, 35, 36, 60, 70 and 72 as having been drawn by him for appellant. He delivered the drawing to appellant at the Publisher's Outlet or the book store on 42nd Street and was paid $25-$30 in cash per illustration [R. 530-540]. On cross-examination he said that in 1956 he had been paid by appellant at the Kingsley Book Store on West 42nd Street where he knew appellant was employed [R. 543].

Peter C. Vaccarella, a retail book store owner at 1481 Broadway,[12] testified that he had known appellant for six or seven years [R. 557-558]. He opened the Peter Vaccarella Book Store in March 1, 1958 [R. 558]. He identified Exhibits 4, 23, 24, 26, 28, 37, 38 and 44 as being books, copies of which he had purchased from appellant for from $1.50 to $2 apiece [R. 559-561]. He paid $2 for Satin Satellite (Exhibit 4) and sold it for $4 and $5 [R. 563].

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Bilbrew: I just turned it out.

Kern: Right. And you knew Mr. Bilbrew, did you not, that when you were asked to make—to draw a picture for the cover of a book it was for that type of book?

Bilbrew: Correct.

Kern: You heard the term "bondage books."

Bilbrew: I have.

Kern: Flagellation.

Bilbrew: I have.

Kern: High heels, and corsets, and all that sort of thing.

Bilbrew: I have.

Kern: And that was what you had in mind, the type—that type of book.

Bilbrew: Correct.

Bilbrew indicated he was still working for Nutrix Publishing Co. in New Jersey and that his pictures were advertised for sale in a number of their periodicals [R. 540].

[12]Vacarella testified he had been in the publishing business with appellant for two years at 218 W. 47th Street under Telephoto Publ. Corp. The business was terminated in Dec. 1957 [R. 558, 564].

Dorothy Yeeto, the owner of a typing service, testified she did typing for Mr. Norman Levenberg and identified certain exhibits as being her billings for such services. The billings identify the book exhibits by book title and date. She also said she had typed the manuscript of certain book exhibits, which she identified [R. 579-593].

Oscar Schaller, book binder, testified that he did book binding work for Mr. Norman Levenberg and identified certain extracts from his business ledger which reflected the work accomplished. The business records showed billings for Exhibits 2, 4, 5, 8, 9, 10, 11, 27, 37, 38, 40, 41, 43, 45, 71 and 72, by title, number of pages, and date that the binding was done. The binding work was performed within the statute of limitations (two years) [R. 598-608].

The testimony of Lawrence De Nino, a binder at the York Binding in New York County was stipulated to and was as follows: Bookbinding work was done in 1959 for Mr. Norman Levenberg on Exhibits 3, 14 through 20 and 46 through 56 [R. 609-610].

Bernard Abrams testified[13] that he was the public accountant for Publisher's Outlet Store since it started

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[13]Abrams testified that Mr. Harvey Revo was president and was listed as an employee with a salary after his name [R. 649]. On cross-examination he testified that the boss at the present time was Mr. Harvey Revo and that before that it was Mr. John George and Mr. Harvey Revo and that he had never known appellant to be the owner or part owner. Justice Breslin pointed out that on Jan. 7, 1958, Revo's salary was $100 a week and appellant's salary was $175 a week and remarked, "And you say Revo was the real owner of the place, is that right?" [R. 652].

Abrams also testified that at the present time Mr. Revo's salary was $200 per week and appellant's was $200 per week [R. 651-652].

in 1957 and identified Exhibit 76 as the payroll book for the store.

Jay Dreher testified that he was a salesman for the Berkeley Publishing Corp. and that he visited the Publisher's Outlet about twice a month from March of 1959 to July of 1959. During this time he saw the appellant there about four to five times [R. 654]. He described his activities in the store.

On November 16, 1960, the Trial Court (Justices Gassman, Breslin and Galloway) denied appellant's motions to dismiss the information as to Counts 1 to 32 inclusive; 37 to 53 inclusive; 57 to 61 inclusive; 63 to 65 inclusive; 67 to 87 inclusive; 89 to 93 inclusive; 95 to 99 inclusive; 101 to 104 inclusive; 106 to 113 inclusive; 115 to 135 inclusive; 137 to 141 inclusive; 144 to 148 inclusive; 150 to 153 inclusive; 155 to 162 inclusive; 164 to 175 inclusive; 177 to 182 inclusive; 185 to 190 inclusive; 192, 193 and 196 to 198 inclusive and found the appellant guilty on each of the above counts. Appellant's motion to dismiss was granted as to Counts 66, 88, 100, 114, 136, 142, 149, 163, 176, 183, 184 and 194 and the appellant was acquitted on each of these counts [R. 699-700].[14] The Trial Court's opinion[15] appears at [R. 720].

The Supreme Court, Appellate Division, First Department[16] affirmed the Trial Court as to the findings on the obscenity counts, but held General Business Law §330, subdivision (2) unconstitutional and deleted from the judgment of conviction the following counts: 160

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[14]See notes 1 through 5, *supra*.

[15]The trial court's opinion is reported in *N. Y. v. Edward Mishkin*, 26 Misc. 2d 152 (Nov. 16, 1960).

[16]The Appellate Division opinion is reported in *N. Y. v. Edward Mishkin*, 17 A. 2d 243, 234 N.Y.S. 2d 342 (Nov. 27, 1962).

through 162, 164 through 175, 177 through 182, 185 through 190, 192, 193 and 196 through 198.[17]

The Court of Appeals of New York affirmed the judgment and order of the Appellate Division.[18]

## Summary of Argument.

The record identifies appellant as a major producer of sado-masochistic pornography.

The essential character of appellant's books is to degrade sex. They are notorious examples of "dirt for dirt's sake." Lust is promoted and filth is portrayed.

The obscenity statutes are criminal in nature, trying the "conduct" of the actor. Appellant's activities are well with their ambit.

Amicus CDL contends that the judgment of the court below is correct in every respect and should be affirmed. We contend that:

I.

The words "sadistic" and "masochistic" are synonymous with the word "obscene" as those words are used in section 1141 of the Penal Law and were so construed by Prosecutor Stein and the Trial Court. "Obscene" is an "abstract" word whereas "sadistic" and "masochistic" are "concrete" or "specific" words.

II.

The Construction of Section 1141 of the Penal Law, adopted by the New York Conrt is binding on this Court.

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[17]See notes 1 through 5, *supra*.

[18]The Court of Appeals decision is reported in 15 N.Y. 2d 671, 255 N.Y. 2d 881 (Dec. 3, 1964).

III.

The test for "scienter" established in the Finkelstein case, "knowledge of the contents of the books" satisfies the constitutional requirements in *Smith v. California.* Appellant's activities do not place him in the coveted area of "honest mistake."

IV.

The sado-masochistic books are not "protected materials." They are "dirt for dirt's sake." Appellant's conduct in manufacturing them is criminal.

V.

Section 1141 of the Penal Law is not vague.

VI.

The book exhibits were not seized in violation of the First and the Fourteenth Amendments.

## ARGUMENT.

### I.

### The Words "Sadistic" and Masochistic" Are Synonymous With the Word "Obscene" as Those Words Are Used in Section 1141 of the Penal Law and Were so Construed by Prosecutor Stein and the Trial Court.

The word "obscene" is an *abstract*[19] word, expressing a general quality, rather than a particular quality. Thus, as expressed by the Trial Court: "To be deemed obscene, it must show 'sexual impurity' and result in the exciting of *lustful and lecherous thoughts and desires,* or tend to stir sex impulses or to lead to sexually impure thoughts." (Our emphasis). The "lustful and lecherous thoughts and desires" referred to by the Court may relate to many classifications of sexual impurity, such as heterosexual, homosexual, lesbian, sadistic, masochistic, etc.

On the other hand the words "sadistic" and "masochistic" are *concrete*[20] words. The use of these words imparts a specific meaning to the type of obscenity proscribed.

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[19]An abstract word is defined in Webster's Collegiate Dictionary, Fifth Edition, as:

"2. of words, names etc. a. Expressing a quality apart from any object (honesty, whiteness) b. General, as opposed to particular (reptile) 3. Dealing with a subject in its theoretical consideration only. . . ."

[20]A concrete word is defined in Webster's Collegiate Dictionary, Fifth Edition, as:

"2. a. Naming a thing, or a class of things, as opposed to naming a quality or attributes; thus 'man' is a *concrete* term but 'human' is abstract. b. Having a specific application; particular, . . ."

In short, the words "sadistic" and "masochistic" are a specific type of obscenity and are synonymous[21] with that term.

Appellant misreads the prosecutor when he construes his statement:

> "Mr. Stein: Just one word by way of the kind of evidence we hope to adduce at the trial. I want to call the Court's attention that the *better number* of books involved here are not the normal types of volumes which are prosecuted in pornography cases. They fall within the specific provisions of 1141 dealing with sadism and masochism.
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> There are, in addition, a great quantity of books which fall within the normal provisions of the pornography section of the Penal Law." (Their emphasis).

to give a meaning to the words "sadism" and "masochism" different from "obscene". We construe the prosecutor to merely draw a distinction between the "abnormal" and "normal" sexual impurities, both of which are within the range of "obscene".

To interpret this statement otherwise is to disregard the prosecutor's remarks at the sentencing of the appellant [R. 711, 714]:

> "And the books your Honors have read, I need not dwell on their contents; they deal with the most vicious type of physical abuse in which human dignity is completely besmirched, all morality is done away with. This is the type material which this

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[21]Synonymous is defined in Webster's Collegiate Dictionary, Fifth Edition, as:

"1. One of two or more words of the same language having the same or nearly the same essential meaning. . . ."

defendant has indulged himself in for quite some time now. . . ."

"Mr. Mishkin has not only followed the pattern, but he has enlarged on it and revised it a great deal, and any of the earlier literature that deals with flagellation, sadism, and brutality, I think is perhaps overshadowed by the kind of works that this man turned out. I think, your Honors, that in order for the problem of the spread of *pornographic literature, particularly the sadistic and masochistic type,* to be finally dealt with firmly, would be to lay hands on this cancerous type growth which besets our city and remove it once and for all. . . ." (Our emphasis).

The Trial Court similarly construed the words "sadistic" and "masochistic" and "obscene" to be synonymous. At R. 722:

"Subdivision 1 of Section 1141 of the Penal Law provides in substance that 'a person who sells . . . or has in his possession with intent to sell . . . obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . is guilty of a misdemeanor.' That section uses the descriptive adjectives quoted above in addition to the objective 'obscene', and it was held that all of those adjectives are synonymous with 'obscene'. (People v. Brooklyn News Co., 12 Misc. 2, 768, 771)."

See also, *People on Complaint of Sumner v. Dial Press* (1944), 182 Misc. 416, 48 N.Y.S. 2d 480 in which the descriptive words of Section 1141, "obscene", "lewd", "lascivious", "filthy", "indecent" and "disgusting" were held to be synonymous (before "sadistic" and "masochistic" were a part of that section).

It is a *non sequitur* to say, as urged by appellant in his brief at page 7, that the testimony of the Commissioner of Police there quoted, in any way establishes that the pre-1956 Section 1141 of the Penal Law did not exclude sadism and masochism. The decision on the booklet "Nights of Horror" in the Kingsley Book case[22] is indisputable evidence to the contrary.

The words "sadistic" and "masochistic" are not superfluous (See Appellant's Brief, p. 8). As legislative mandates, they provide insurance against ineffectual action on the part of some Trial Court judges.

## II.

## The Construction of Section 1141 of the Penal Law, Adopted by the New York Court Is Binding on This Court.

The Trial Court in its opinion construed the words "sadistic" and "masochistic" to be synonymous with "obscene" [R. 722],[23] and the Appellate Division[24] and the Court of Appeals of New York[25] agreed.

The interpretation given, in appellant's case, to the adjectives which appear in section 1141 is consistent

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[22]See the opinion of Trial Judge Matthew M. Levy in *N. Y. v. Kingsley Books Inc., Louis Finkelstein, dba Times Book Store, et al.*, in 208 Misc. 150, 142 N.Y.S. 2d 735 at 741-743 (June 13, 1955), affirmed in *Kingsley Books Inc., et al. v. Brown*, 1 N.Y. 2d 177, 134 A. 2d 461, 151 N.Y.S. 2d 639 (Apr. 27, 1956), affirmed by the United States Supreme Court in 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (June 27, 1957). (Only Justices Warren, Harlan, Clark, Brennan, Black and Douglas of the 1957 court remain.) The word "obscene" as used in Section 22a of the Code of Criminal Procedure has the same meaning as the word "obscene" in Section 1141 of the Penal Law. *Tenney v. Liberty News Distributors Inc.*, 13 A. 2d 769, 215 N.Y.S. 2d 661 (May 29, 1961).

[23]See note 15, *supra.*

[24]See note 16, *supra.*

[25]See note 18, *supra.*

with prior decisions. *People on Complaint of Sumner v. Dial Press (supra); People v. Brooklyn News Co. (supra); Kingsley Book Inc. v. Brown (supra).*

The views of the court below, in respect to the above construction of the New York statute, are completely non-reviewable by this Court. Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court *must* accept the state court's construction and proceed to test the validity on that basis. *General Trust Company v. Blodgett,* 287 U.S. 509, 513; *Kingsley Pictures Corporation v. Regents,* 360 U.S. 684, 688.[26]

The appellant's reliance on *Lanzetta v. New Jersey,* 306 U.S. 451 (1939) in this connection is misplaced. In *Lanzetta,* the Supreme Court noted that the statutory crime there involved was one unknown to the common law and that it was unconstitutional on its face because of vagueness and indefiniteness. The Court then went on to hold that higher courts could not *for the first time on appeal* render the statute clear and definite by interpretation and thereby sustain a conviction had prior to that interpretation. Here, the crime in question was one known to the common law,[27] and had been interpreted by the New York courts prior to the trial, and by the trial court itself prior to the conviction. Further, the trial court's interpretation was consistent

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[26]This Court said in *Kingsley Pictures Corp. v. Regents,* 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (June 29, 1959), involving New York's obscenity statute and the motion picture film "Lady Chatterley's Lover," at page 688," we accept the premise that the motion picture here in question can be so characterized. We accept too, *as we must,* the construction of the New York Legislature's language which the Court of Appeals has put upon it . . ." (our emphasis).

[27]Curl's case, 2 Stra. 788 (1727).

with the higher court's interpretation, which did not occur in *Lanzetta.*[28]

The appellant in *N.Y. v. Finkelstein,* 9 N.Y. 2d 342, 174 N.E. 2d 470 (Mar. 30, 1961), having failed to prevail[29] with *Lanzetta,* it is difficult to see its application in this case.

III.

**The "Scienter" Test, "Knowledge of the Contents of the Books", Established in the Finkelstein Case Satisfies the Constitutional Requirement in Smith v. California. Appellant's Activities Do Not Place Him in the Caveated Area of "Honest Mistake."**

Except for the constitutional limitation expressed in *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959), the interpretation that a state court gives to the "MENS REA" requirement ("scienter") of an obscenity statute is binding upon this Court (see II).

The Court of Appeals of New York, in *N.Y. v. Finkelstein et al.,* 9 N.Y. 2d 342, 174 N.E. 2d 470 (Mar. 30, 1961) *interpreted* section 1141 of the Penal Law to re-

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[28]See *Lanzetta v. New Jersey* at p. 455, "The descriptions and illustrations used by the (trial) court to indicate the meaning of 'gang' are not sufficient to constitute definition, inclusive or exclusive . . . The latter interpretation (trial court's) would include some obviously not within the statute and would exclude some plainly covered by it. . . ."

[29]At the time of the prosecution in *Finkelstein,* Section 1141 of the Penal Law had been interpreted by the prevailing precedent, an appellate department decision, not to require "scienter." The trial judge however, interpreted the statute to require "scienter." The Court of Appeal agreed with the trial court's interpretation. Writ of Certiorari was denied by the U.S. Supreme Court. (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962).

quire "scienter", thus obviating the infirmity of the *Smith* case. The court there said at page 471:

> "A reading of the statute as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished . . ."

The "scienter" requirement was further defined by the Court of Appeals in *N.Y. v. Finkelstein,* 11 N.Y. 2d 300, 229 N.Y.S. 2d 367, when the same case came back on appeal a second time, to mean "knowledge of the contents". At page 304, the Court said:

> "Both defendants presently contend that the proof fails to establish *scienter.* In our opinion, however, *scienter—'knowledge* by * * * [defendants] *of the contents of the book*[s]' (Smith v. California, 361 U.S. 147, 149, 80 S.Ct. 215, 216, 4 L.Ed.2d 205)—was sufficiently proven beyond a reasonable doubt. As the Supreme Court of the United States said in Smith v. California, supra, p. 154, 80 S. Ct. p. 219: 'Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.' The voluntary admission on the part of each defendant that he had seen worse books than those here involved, the lurid statements on the covers, the $5 selling price boldly stamped on the front cover of each paper-covered book, taken together, warranted the trial court's conclusion that *scienter* was established beyond a reasonable doubt" (our emphasis).

The overwhelming weight of evidence in this case was that the appellant was the publisher and as such, *had knowledge of the contents of the material.* Under the facts of appellant's case, it is beyond question that, under New York law, the Court of Appeals was correct in affirming the trial court's finding that the "scienter" requirement had been proved.

Appellant's attack in Point IV of his brief is on the New York interpretation rendered in *N.Y. v. Finkelstein,* 11 N.Y. 2d 300, 229 N.Y.S. 2d 367. He says, in effect, assuming appellant had "knowledge of the contents," that is not enough for a *Prima Facie* case (our emphasis).

At page 13 of Appellant's brief, appellant argues:

> "From Smith v. Calif., 361 US 147, is to be learned that a defendant not only must know the contents of the book, but must know that they are of the character proscribed. In other words, it must be shown that the defendant had made an evaluation judgment concerning the books . . ."

Such an interpretation misreads the *Smith* decision. Appellant has extracted wording out of context to support his hypothesis, and has totally disregarded the express holding in the *Smith* case.

Appellant's argument flies in the face of the *Finkelstein* case (*supra*). There, retailers of the very material which appellant was publishing (Queen Bee) were convicted on *circumstantial evidence* that they had "knowledge of the contents." This Court denied certiorari in the *Finkelstein* case. The People in appellant's case presented *direct evidence* that Mishkin had knowledge of the contents.

This Court did not make *subjective* knowledge a constitutional requirement in the *Smith* case. At page 154 the court said:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents* or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law, 68 Harvard Law Review 1. Cf. American Communications Association v. Douds, 339 U.S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his *awareness of its contents*. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial" (our emphasis).

It is clear from the above language that, with one exception, the Court was not considering "scienter" in the narrow terms of the seller's subjective knowledge that the matter was obscene. What the Court was saying was that if: (1) the material is, in fact, obscene and (2) the seller has knowledge, or is aware of the contents or nature of the material, then a *prima facie* case for "scienter" has been established to permit the matter to go to the jury.

The Court did however leave a small area undecided —whether the defense of "honest mistake" in certain

cases might be essential as a matter of constitutional principle, at page 155:

> "We need not and most definitely do not pass today on . . . whether honest mistake as to whether its contents in fact constituted obscenity need be an *excuse*. . ." (Our emphasis).

In voicing this caveat, a question has been raised as to the force of *Rosen v. U.S.*, 161 U.S. 606 (1896), the long standing Supreme Court authority in this area.[30]

The *Rosen* case made subjective knowledge of obscenity completely irrelevant. There the defendant was convicted under a federal statute which made it a misdemeanor to "knowingly deposit obscene matter in the mail." The trial court had refused to give a jury instruction which provided that the jury must acquit if it entertained a reasonable doubt whether the defendant *knew* that the matter was obscene. On appeal, the U. S. Supreme Court said at page 610:

> "The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the

[30]Any doubt that the *Rosen* case is still the law on this point should have been dispelled by the approval given to this citation in *Roth v. U. S.*, 354 U.S. 476, 491 at footnote 28.

> opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd and lascivious."

The *Rosen* case, was, in short, a public policy statement by that High Court that when one deliberately enters the distribution field of material of a sexually descriptive nature, he takes the risk of offending current community standards and must be held accountable if he does. If it be thought that this puts too great a burden of prescience on defendants, the answer is, in the words of Mr. Justice Holmes, in *Nash v. U.S.*, 229 U.S. 373, 377, cited in *Tyomies Publishing Co. v. U.S.*, 211 Fed. 385:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death. . . ."

The facts in appellant's case, however, do not call for a reevaluation of the *Rosen* statement of the law.

In this regard, consider the "state of mind" spectrum where "knowledge" is concerned, as applied to a person who has sold a book which is obscene as a matter of fact. Degrees of guilt are listed in inverse order:

(1) He may have been aware of the fact the material was obscene from personal observation.

(2) He may have believed the fact the material was obscene.

(3) He may have been aware that he had not the slightest notion whether the book was obscene or not (avoidance of knowledge).

(4) He may have believed the book not obscene, but have had no reasonable grounds for his belief (criminal negligence).

(5) He may have believed the book not obscene, but have had reasonable grounds for his belief (honest mistake).

It is to situation (5) above that the majority opinion raised a *caveat*. By no stretch of the imagination do appellant's activities place him in the category of "honest mistake."

Further, appellant's argument is directed against the requirements for a *prima facie* case (appellant did not testify). The cases in this area as to which this Court has denied certiorari are a complete answer to appellant's assertion. *U.S. v. Samuel R. Hochman,* 277 F. 2d 631, 633 (June 7, 1960), cert. denied 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (Oct. 10, 1960), rehearing denied 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960); *U.S. v. Roy A. Oakley,* 290 F. 2d 517 (May 24, 1961), cert. denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct 23, 1961), rehearing de-

nied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961); *Harold S. Kahm v. U.S.,* 300 F. 2d 78 (Feb. 9, 1962), cert. denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962); *New York v. Finkelstein* (*supra*); *Wisconsin v. Chobot,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (Nov. 29, 1960), appeal dismissed for want of a federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961). See also *Conn. v. Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (Nov. 6, 1962); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 231 (Dec. 16, 1963), (reversed on other grounds); *Nebraska v. Jungclaus,* 176 Neb. 641, 126 N.W. 2d 858, 862 (March 13, 1964); *Chicago v. Doe,* 47 App. 2d 460, 197 N.E. 2d 711, 715 (April 2, 1964); *Illinois v. Sikora,* .... Ill. ...., 204 N.E. 2d 768 (Jan. 21, 1965); *Missouri v. Vollmar,* .... Mo. ...., 389 S.W. 2d 20 (March 8, 1965); *Ohio v. Mazes,* 3 Ohio App. 2d 90 (April 5, 1965).

IV.

**The Sado-Masochistic Books Are Not "Protected Materials." They Promote Lust and Portray Filth for Its Own Sake. They Are "Dirt for Dirt's Sake." Appellant's Conduct in Disseminating Them Is Criminal.**

The essential character of Mishkin's books is to degrade sex. In his opinion, Justice Gassman eloquently stated the case in the Trial Court against the materials and conduct of the actors in this drama:

> "In writing the books before us, the respective authors made 'no attempt to point to any lesson that might be of value to any one that would read

them. It was just a clear attempt to portray filthy ideas.' (*People v. Pesky,* 230 App. Div. 200, 202).

They lack literary merit. They teach no lesson and point no moral. The authors of these books have not become distinguished by their place in the literary world nor by the quality of their style of writing. They wrote these books on order from the defendant. One of them, in signing a contract for the sale of two of his manuscripts to the defendant (People's Exhibit 74) stipulated therein that his name should not appear as the author of the books. Another testified that the defendant wanted her to write a book full of sex scenes—'women making love to women, sodomy, lesbian scenes, spankings'. She testified that she never wrote any book on these subjects before and that defendant gave her some books he had to aid her in her research. A third, who wrote a large number of these books at defendant's request, testified that in one instance, defendant gave him a book and asked him to expand on it; that defendant told him he wanted 'wheels on female bodies and the darkening of flesh under flaggellation.' These books deal with sex in its most corrupt, sadistic, masochistic and degenerate form. They promote lust and portray filth for its own sake, or as Judge Woolsey called it in the *Ulysses* case (5 Fed. Sup. 182, 184), 'dirt for dirt's sake'.

The language of the Court of Appeals in *People v. Pesky,* 230 App. Div. 200, at page 204, is quite appropriate to the situation before us. The court there said: 'These matters must be judged by normal people and not by the abnormal. Con-

ditions would be deplorable if abnormal people were permitted to regulate such matters. Of course, there are some people who seem to be unable to find anything obscene in anything written. It is very clear that the author of the book now before us for consideration was not thinking of the spiritual, but devoted the whole book to the animal instincts of the human race. His efforts were not a lesson in morality, nor an attempt to uplift the mind of the reader. * * * While some people may think this quite smart, a book of this kind, which has nothing to recommend it, and dealing only with such details, is properly held to be disgusting, indecent and obscene.' "

The "psychology" of appellant's materials[31] comes through very clearly upon close analysis. See here, the book outline of Exhibit 3, entitled "The Female Sultan" appearing in Appendix A. The circumstances surrounding the creation of "Female Sultan" appear at note 9.

This Court has heretofore passed upon the merits of Exhibit 72, entitled Queen Bee[32] and the conduct of Finkelstein, one of its retailers. If there is any difference, it is that the conduct of appellant is more culpable; the product is the same.

The State Courts of New York have heretofore expressed a strong public policy against sado-masochistic obscene materials. *Kingsley Book Inc. v. Brown* (*supra*) ("Nights of Horror"); *N.Y. v. Finkelstein et al.* (*supra*) ("Queen Bee", "Garden of Evil"); *People v. Hay et al.*, 245 N.Y.S. 2d 705 (Dec. 3, 1963) and

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[31]See note 11.

[32]See note 4.

*Peopie v. Hay,* 258 N.Y.S. 2d 238 (March 18, 1965); ("Betty Page in Bondage", "Ruthless Treatment of Bound Slaves", "Bondage Fight"). It would be a distortion of the "Community Standards" principle to say that a state must accept such materials.

Although both the *Finkelstein* and the *Mishkin* cases were decided by a court without a jury, sophisticated juries elsewhere have expressed the same view regarding the nature of his product.[33]

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[33]In *U.S. v. Walter F. Wissman and Leon A. Grant, Docket 29023,* a Los Angeles Federal Grand Jury indicted two disseminators in six counts for the distribution and advertising of "Swish Bottom", "Screaming Flesh" and "The Holdout" 18 U.S.C. 1461. A jury found both defendant guilty on all six counts on January 10, 1962. "Swish Bottom" appears as Exhibit 29 and "Screaming Flesh" as Exhibit 21 and 57. Although an appeal has been filed with the Circuit Court of Appeal for the Ninth Circuit, Docket 17865, no action has been taken on the appeal. The jury in *U.S. v. Klaw, infra,* note 35; is representative of what *any* jury in the United States would do with sado-masochistic obscenity. They recognize what Judge Moore could not see in the *Klaw* case in the "smoke" of the high court's opinions—material, whose essential character is to debase sex, is *totally* unacceptable in the modern American community today. Compare Judge Moore's obscenity opinion in *U.S. v. Darnell,* 316 F. 2d 813, 818 in an earlier year 1963:

> "In New York the courts have been kept busy with the same problem. As might be expected, there are situations clearly within the statute and clearly without and, of course, the troublesome borderline case. The decisions, however, should be quite helpful in reaching the correct result here. On the one hand, there are the cases in which the magazine and letters sold surreptitiously to the public *are designed solely to appeal to "prurient interest." They are* the standard sado-masochistic, bound, gagged and tortured type with grossly exaggerated drawings, including all the usual fetishes and stories appealing only to a cult (if such exists) of (by normal standards) perverts.[9] . . .
>
> [9]In this group are the materials before the courts in *Peo. v. Zucker . . . Peo. v. Mishkin . . . Peo. v. Fried . . . Peo. v. Finkelstein . . .*" (ours emphasis.)

Then, the Judge thought that the books etc. in *Zucker* and *Mishkin,* College for Sinners and Sex Cat in *Fried,* and Garden of Evil and Queen Bee in *Finkelstein* were "obviously written to arouse prurient interest."

The choice of a court trial apparently was Mishkins. While a jury trial may not be had on a misdemeanor in the Courts of Special Sessions in the City of New York, the practice is to make a request for a jury trial in an obscenity case reasonable cause for removal to a court, where a jury trial may be had. See Criminal Procedure in New York, Paperno and Goldstein at page 745. *People v. Goldman,* 197 Misc. 290, 94 N.Y.S. 2d 535; *People v. Morganstern,* 134 Misc. 127, 234 N.Y.S. 2d 11; *People v. Herk,* 44 N.Y.S. 2d 444.

To understand what the United States Supreme Court considers to be proscribable material and criminal conduct in this area, one should logically start with the *Roth-Alberts* cases, 354 U.S. 476, both of which were criminal prosecutions, and the concurring opinions of Justices Harlan and Warren. Both Justices in that case felt that the subject matter should be reviewed (in the *Alberts* case, the subject matter was sado-masochistic and ordinary nude photos—commercial obscenity. See 45 Minnesota Law Review 5, 24 footnote 102), and after review, found the matter to be within the area of a jury question. Those Justices were looking at commercial obscenity—the same subject matter we are concerned with in this criminal appeal. Justice Warren said at page 1513:

> "The defendants in both these cases were engaged in the business of purveying textual or graphic material openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect."

In obscenity cases as in criminal cases in general, the defendant's conduct is the central issue. As stated by Chief Justice Warren in his concurring opinion in *Roth v. U.S.*, 345 U.S. 476, 494:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

See also Chief Justice Warren's opinions in *Kingsley Books Inc. v. Brown,* 354 U.S. 436, ...., L. ed. 2d 1469, 1476 (1957), and *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1673, 1685 (1964).

The same principle is very well stated by the Supreme Court of Errors of Connecticut in *Connecticut v. Sul,* 146 Conn. 78, 147 A. 2d 686, 691 (Dec. 24, 1958):

> "Obscene and indecent are not technical terms of law and hence susceptible of fine distinctions. Whether something is obscene or indecent depends upon all of the surrounding circumstances. Section 8567 comprehends material which from its very character a person of sound mind must know was obscene and indecent. See Wigmore, Evidence (third edition) page 43. It also includes material which by the method of its presentation to the prospective reader or viewer shows a design to appeal to sordid interests. See Roth v. U.S., supra, 354 U.S. 495, 77 S.Ct. 1314 (concurring

> opinion). To cite an example; if language and pictures describing or portraying human sex organs are contained in a book or brochure on medical science and treat the subject with no more frankness than is required, they would not be obscene or indecent within the statute. But if the same language and pictures were taken from their context and compiled in pamphlet form to be sold or shown to children, they would be. People v. Muller, 96 N.Y. 408, 413. The purpose of the statute is to prevent the selling, showing or offering of obscene or indecent material falling within the description stated."

See also the expression of the Supreme Court of Errors of Connecticut to the same effect in *State v. Andrews,* 186 A. 2d 546 at page 550.

The reporter's comments on the American Law Institute, Model Penal Code, 1957 draft (section 207.10) is to the same effect, at page 13:

> "The main purpose of Section 207.10 is to suppress commerce in the obscene. If production and circulation of obscene material for gain could be eliminated, the supply would be cut off at the source. . . ."

Much has been said regarding the difficulty encountered in the Supreme Court in affirming obscenity *convictions* in recent years. Those commentators, however, have failed to note a very basic distinction. The cases (with one exception) involved *civil judgments* in "*prior restraint*" cases.

When the obscenity statutes have been applied as criminal statutes trying "conduct", the peoples' case

has met with no opposition from the United States Supreme Court, except in the case of *Jacobellis v. Ohio*, 378 U. S. 184, 84 S. Ct. 1674. See:

*Roth-Alberts v. California,* 354 U.S. 476 (June 24, 1957);

*John G. Matthews v. Florida,* writ of certiorari denied 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 (March 31, 1958), notwithstanding the similarity of the statute to the Michigan Statute in *Butler v. Mich.,* 352 U.S. 80;

*Wyman Hulan Parr v. U.S.* (film), 255 F. 2d 86, writ of certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 (Oct. 13, 1958);

*Max Padell v. U.S.* (paperback books), 262 F. 2d 357, writ of certiorari denied 359 U.S. 942 79 S. Ct. 723, 3 L. Ed. 2d 676 (March 23, 1959);

*Robert H. Cain v. U.S.,* 276 F. 2d 598, writ of certiorari denied 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 (April 18, 1960);

*Samuel R. Hochman v. U.S.* (paperback books: "The Sex Factory" and "Virgins Come High") 277 F. 2d 631, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari) 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (Oct. 10, 1960) rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960);

*Frank L. Collier v. U.S.* (photographs of nude young men) 283 F. 2d 780, writ of certiorari denied 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 (March 6, 1961);

*Herman Womack v. U.S.* (photographs of nude young men) 294 F. 2d 204, writ of certiorari denied 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 (March 27, 1961);

*Astore v. U.S.* (film) 288 F. 2d 26, writ of certiorari denied, 366 U.S. 925, 81 S. Ct. 1352, 6 L. Ed. 2d 384 (May 15, 1961);

*Joseph Chobot v. Wisconsin* (girlie magazines: "Spice" "Adam" "Spree" and "Blondes, Brunettes, and Redheads") 12 Wis. 2d 110, 106 N.W. 2d 286, appeal dismissed for lack of a federal question (Justices Black, Douglas and Harlan voted for probable jurisdiction), 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961), rehearing denied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961); *Roy A. Oakley v. U.S.* (unretouched photographs of naked young women) 290 F. 2d 517, writ of certiorari denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct. 23, 1961) rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

*Harry Monfred et al. v. Maryland* (girlie magazines: "Candid" Consort" "Sextet" "Cloud 9" "Torrid"), 226 Md. 312, 173 A. 2d 173, writ of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962);

*Alfred J. Heinecke v. U.S.* (Photographs of nude young men—similar to *U.S. v. Womack*) 294 F. 2d 727, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari). 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 (Nov. 6, 1961);

*Harold S. Kahm v. U.S.* (for description of subject matter, see 300 F. 2d 78 at 82), 300 F. 2d 78, writ of certiorari denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962);

*Louis Finkelstein et al. v. New York* (paperback books: "Garden of Evil" and "Queen Bee"), 229 N.Y.S. 2d 367, 183 N.E. 2d 661 writ of certiorari denied (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962); see note 4 herein.

*Harold Zucker v. New York* (3 sado-masochistic books similar to 50 books involved in appellant's case, writ of certiorari denied (Justice Douglas voted to grant certiorari) 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

*Arthur Goldstein v. Virginia* (girlie magazines) writ of certiorari denied 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963);

*Edward Mishkin v. U.S.* (books not named) 317 F. 2d 634, writ of certiorari denied 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 (Oct. 14, 1963);

*John Darnell, III, v. U.S.* (obscene letter), 316 F. 2d 813, writ of certiorari denied (Justice Douglas voted to grant certiorari), 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155 (Nov. 12, 1963), rehearing denied, 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 (Jan. 6, 1964);

*Nirvana Ward Zuideveld v. U.S.*, 316 F. 2d 873, writ of certiorari denied, 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 (Feb. 17, 1964);

*Harry Fried v. New York* (paperback books: "College for Sinners" "SexCat" and seminude photographs of women), 238 N.Y.S. 2d 742, appeal dismissed for lack of jurisdiction. Treating the papers wherein the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justices Black, Douglas and Stewart are of the opinion that probable jurisdiction should be noted and judgment reversed), 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 26, 1964);

*Samuel Dodd Williamson v. California* (paperback book: "Fear of Incest"), 24 Cal. Rptr. 734, writ of certiorari denied (Justice Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied .... U.S. ...., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964);

*Harold Eugene Wenzler, Sr., and John Imlay v. California* (8 mm movie, 12 minutes—"First Fling" described as girlie magazine subjects in motion) writ of certiorari denied (Justice Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied, .... U.S. ...., 85 S. Ct. 14, 13 L. Ed. 2d 77 (Oct. 12, 1964).

The thread which runs through all of the above cases[34] is the culpable "conduct" of the defendant. As

[34]While it is said, in general, that the denial of a petition for certiorari means "nothing" or "nothing much", is this argument

an example, while the film was not before this Court in the *Wenzler* case *(supra)*, the transcript of the trial was. The conversation between the police officer and employer Imlay made it crystal clear that the movie being purchased was not a home movie for family consumption.

A criminal statute, holding a person criminally liable for "conduct" *after* the voluntary act, is to be *distinguished* from other methods of obscenity proscription such as search warrant proceedings, censorship boards, licensing procedures, etc., which aim at destruction of the material or keeping the material off the market and which by their nature are subject to attacks on Constitutional grounds as invoking "prior restraint" upon free speech, press, etc. The destruction between the two insofar as free speech is concerned is that, while speech is "free", a person may be held accountable for the abuse thereof.

Where "prior restraint" is not an issue, the people's cause has entertained little difficulty. Where defeat has been met, it has been exclusively in the area of "prior restraint".

Justice Warren, in his dissenting opinion, in *Jacobellis v. Ohio,* 84 S. Ct. 1674 (June 22, 1964), voiced an opinion that the United States Supreme Court is not defending obscenity, but that it only *appears*[35] to do so

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valid, if our judicial reasoning is committed to the "Constitutional Judgment" principle in obscenity cases? See *Supreme Court Practices, Third Edition Stein and Grossman at pp. 182-183.* Must these 22 cases remain as anonymous statistics, and only the reversals be given publicity? At least one State Supreme Court has used them to advantage. See *Conn. v. Andrews,* 150 Conn. 92, 186 A. 2d, 546 (1962).

[35]It is our opinion that the High Court has failed to hit the mark in its obscenity opinions. The opinion of Justice Moore in *U.S. v.*

when it is faced with procedurally bad cases, at page 1685:

> "There has been some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do—for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

The "procedurally bad cases" referred to by Justice Warren were cases involving "prior restraint". Where difficulty has been encountered, it has been in the area of "prior restraint" by administrative officials (motion picture censor boards and postmaster cases) and mass seizures under search warrants, aimed at destruction of

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*Klaw*, included in appellants brief at Appendix B (decided July 15, 1965) is typical of the misunderstanding which has been engendered. The result reached in *Klaw* is the direct opposite of the results reached in *Roth-Alberts*, which dealt with similar materials. If Roth and Alberts were not pornographers, why was the verdict left standing? That Judge Moore should reverse the jury's verdict, holding Nutrix' sado-masochistic materials to be obscene, is a reversal of common law principles which hold the jury to be the embodiment of community standards. It is representative of the chaotic results flowing from the High Court's handling of obscenity cases. See in this regard Justice Shapiro's opinion in *N.Y. v. Birch, et al.*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) and Judge Sprankle's opinion in *Calif. v. Milton Luros, et al., Superior Court* case 295,183, reported in the Los Angeles Daily Journal Report Section Part 3, page 14. The "appearance" that the court is "sponsoring" obscenity is inadvertently becoming an actuality through a "follow the leader, without understanding" action on the part of the lower courts. The solution, in our opinion, lies in the critical comment of *40 Notre Dame Lawyer 1*, (Dec. 1964).

the material only. An examination of the cases underscores this point of distinction.

Th*e* *Roth* decision was less than six months old when four "prior restraint" cases reached the United States Supreme Court. In two, the Postmaster refused to accept material for deposit in the mails; in one, a censorship board denied a license to a movie and in the last, the custom's officials refused to permit entry of certain materials into the United States. In each instance, law enforcement chose "prior restraint" methods in preference to trying the criminal conduct of the individual, as in the *Roth* case. In December 1957, and January 1958, the United States Supreme Court reversed all four lower court judgments *but without stating why,* other than to cite *Roth* in the three federal cases and *Alberts* in the state case. But what expression of law in *Roth-Alberts* was applicable? Both of those were criminal cases.

Although both "obscenity" and "prior restraint" were present and the cases could have been decided on either issue, most commentators assumed the high court decided the obscenity issue "sub silentio", for the high court did not send the matter back for further treatment. Few considered the possibility that the high court might penalize law enforcement for procedural defects where "prior restraint" was employed. To release obscene material would be akin to giving scandal by "implying" approval, and previous policy had never undertaken that risk. Later "prior restraint" cases which were accompanied by written opinions were to prove this reasoning to be in error. The court has applied judicial blinders in certain cases.

In *Marcus v. Kansas City Search Warrants,* 367 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708 (June 19, 1961), a unanimous Supreme Court reversed a Missouri judgment that 100 items were obscene. In this prior restraint case however the high court *explained its reason with an opinion.* The administrative procedures employed in executing search warrants were deficient. The United States Supreme Court explicitly stated that it *would not consider* the obscenity issue under these circumstances (defect in "prior restraint" procedures).

In *Manual Enterprises, Inc. v. Day,*[36] 370 U.S. 478, 8 L. Ed. 2d 639, 82 S. Ct. 1432 (June 25, 1962), illustrating the pitfalls of faulty procedure, three Justices explicitly stated, in casting their vote for reversal, that the Postmaster did not have the power under the statute to exclude three magazines from the mails on his own determination that the magazines were aimed at homosexuals and were obscene. Yet one year earlier the United States Supreme Court had unanimously refused to review a criminal conviction involving the president of the same company, Herman L. Womack, who had himself been prosecuted criminally for distributing the same type of material.

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[36]Appellant's citation of the *Manual Enterprises* case at page 16 and 19 of his brief attempts to convey the idea that material aimed at the prurient interest of sex deviates is protected matter, under that case. The contention completely misses the significance of Justice Harlan's opinion in the *Manual Enterprises* case. If we understand Justice Harlan's viewpoint correctly, he would not apply that reasoning (which was the opinion of two judges only, and was not the "opinion of the Court") to the *Mishkin* case, which is a *state case.* We would hope that Justice Harlan, who by no means is a defender of obscenity, would clearly assert this proposition, to counter the harm which is being done in state courts through misconstruction. Better still, that he would abandon the federal-state distinction and retain his attitude in *Jacobellis v. Ohio* and *A Quantity of Books v. Kansas,* 84 S. Ct. 1723.

In *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (June 22, 1964), a similar result was reached in another "prior restraint" case in which the Kansas Supreme Court had held that 1715 copies of 31 Nightstand paperback books were obscene. The reversals were on the same grounds. The procedures employed in executing the search warrants were deficient. At least four Justices thought so, which when added to the votes of Justices Black and Douglas were sufficient for reversal. These four Justices explicitly stated, "We do not reach, and intimate no view upon the appellant's contention that the Kansas courts erred in holding that the novels are obscene. . . ."

More recently, the high court had before it in 1965 two movie cases and this same issue of prior restraint—the movie censor board. *Freeman v. Maryland,* October Term 1964, No. 69 and *Trans-Lux Distributing Corporation v. Board of Regents of New York,* October Term 1964, No. 314. The *Maryland* case dealt with an innocuous film, as to which there was no claim of obscenity whatsoever. To test the statute, Freeman refused to apply to the Maryland censor board for a license. When he exhibited the film, he was convicted of failing to apply for a license. On the other hand, in the *Trans-Lux* case, the New York Court of Appeals had affirmed the Board of Regents' denial of a license to the foreign film, "A Stranger Knocks" because of its obscene portrayals, requiring that certain cuts be made. One of these was an extremely erotic portrayal of the sex act and orgasm (with music) of the female lead from her position astride a male, lying on a couch. The court heard arguments and reversed the *Freeman* case, holding the Maryland procedure bad for placing on the ex-

hibitor (rather than the State) the burden of initiating the court action to prove the right to a license. In the *Trans-Lux* case the high court did not hear argument but instead, reversed on the grounds of the *Freeman* case, once again applying "blinders" on the ultimate issue of obscenity.

Common to the adverse results in 1958, 1961, 1962, 1964 and 1965 was the "prior restraint" issue. The high court, in its written opinions made it clear that, obscene or not, the material would be turned free if the prior restraint procedures did not meet their new emerging standards.

The obscenity statute under which the State of New York has proceeded however, is a *criminal* statute holding the appellant criminally liable for his "conduct" in publishing obscene materials. He has been charged with and convicted of engaging "in the commercial exploitation of the morbid and shameful craving for materials with prurient effect." (See Chief Justice Warren's opinion in *Roth-Alberts, supra*). The case at issue is not a "prior restraint" case.

Appellant disregards the *function* of the obscenity statutes when he argues in his brief at page 18

> "whatever high intellectual level these books lack, cannot serve to deprive persons who may find interest in them. And the converse is obvious, that those persons who do not wish to read them can refrain from doing so . . ."

Community standards influence private morality. Where factors adverse to good public morality flood the community, the moral fiber of the citizen is subjected to eroding forces. The obscenity statutes *function* to main-

tain high standards of moral conduct. They are *criminal statutes* directed against the conduct of those individuals who unleash the forces of erosion.

His proposition that those who do not wish to read them "can refrain from doing so." flies in the face of this Court's instruction in *Roth-Alberts,* 354 U.S. 476 that there is a community conscience which considers *everyone:*

> "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, *but upon all those whom it is likely to reach.* In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards." (our emphasis).

If appellant's proposition were to prevail, there would be no obscenity laws.

When the attack was made by the two commercial pornographers Roth and Alberts in 1957, this court stood its ground and affirmed what had always been the American tradition. Matter whose dominant purpose was to excite lustful thoughts was utterly without redeeming social importance and could be proscribed by state and federal law.

Justice Learned Hand, father of the modern law on obscenity, pointed out in *"The Bill of Rights"* at page

63, the Roth decision recognized that "it had been the long-established habit of most societies to suppress language likely to arouse lewd emotions; and that this might be a lawfully protected interest regardless of any conduct that would result." The decision said no more than what our courts have recognized for the previous 150 years.

The function of the obscenity laws is not, as is often suggested by those opposed to obscenity laws, the eradication of that social evil which directly results in anti-social conduct, nor even that social evil which "probably" or "possibly" is the cause of such anti-social conduct. Although, in fact, anti-social conduct[37] is known to follow (to what extent is not known) the validity of the obscenity laws does not depend upon such a result being reached in individual cases. Neither does it concern itself with the danger that children may come into contact with the material. Rather the laws' concern is with the more general accepted historical notion, that a society in which obscene material is readily available for its members is not a healthy society and is heading downhill.

Several hundred years ago a poet wrote in simple verse what we consider to be the clearest statement of "why" government acts to outlaw obscenity. In 1705, Alexander Pope wrote in his quatrain on "The Monster Vice":

> Vice is a monster of so frightful mien
> As to be hated, needed to be seen
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace.

---

[37]Recommended reading for those who see no anti-social significance in sado-masochistic materials, see *California v. Glatman*, 340 P. 2d, 8 (June 5, 1959). The sexual significance of the bondage photograph is in the mind of the sex deviates. Read *Glatman* and then review the materials, again.

Justice Fox of the District Court of Appeal of California expressed it as follows in *California v. Williamson*, 207 Cal. App. 2d 839 (Sept. 26, 1962), writ of certiorari denied 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied .... U.S. ...., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964).

> "The effect of such 'literature' is to dull the moral sensitivity of many, if not most, of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have overindulged their appetites and cast aside decent standards of behavior.'"

The existence of obscenity is the symptom of a disorder which probability teaches us, will lead to ruin. Arnold Toynbee, the historian, tell us that 19 of the 21 great civilizations which flourished in world history, crumbled into ruin—not because of armed aggression from without, but because of moral decay from within.

Being a nation that takes stock in representative sampling, we seek to assure a healthy future by capitalizing on the experience of the past.

An examination of man's historical experience with the sexual urge lends credence to the adage, "There is nothing new under the sun."

A nation which is preoccupied with sex is thought to be "sick". The ultimate evil would be a society in

which sex pictures, novels, and magazines, are available at every store, sex pictures on every marquee, sex movies in every theater, sex pictures in every art gallery and sex language in every dialogue. To the extent that we approach this status by degrees, we recognize we are closing the gap on the community of "Sodom and Gomorrah." The anti-social conduct of today's society becomes the socially acceptable conduct of the new community.

In sum, the case for the governmental action taken by the State of New York, and against appellant's proposition was stated by U.S. Supreme Court Justice Harlan in his concurring opinion in *Roth-Alberts* (*supra*) at p. 502:

> "The State can reasonably draw the inference that over a long period of time the indiscrimnate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards . . ."

## V.

### Section 1141 of the Penal Law Is Not Vague.

Appellant asserts at page 18 of his brief:

> "The guessing at what the law permits and what it forbids has resulted in a three year prison sentence and a $12,000 fine imposed on Mishkin. It is less than justice to impose such penalties because the guess was wrong at a law that is not clear to anyone . . ."

The complete legal answer to this was given by the United States Supreme Court in *Roth-Alberts (supra)*,

at 491, footnote 28 when the same claim was made there:

> " 'Everyone . . . must take notice of what, in this enlightened age, is meant by decency, purety and chastity in social life, and what must be deemed obscene, lewd, and lascivious.' Rosen v. U.S. 161 U.S. 29, 42."

See also *Nash v. U.S.* and *Tyomies Publishing Co. v. U.S.*, at Point III (*supra*). As noted in Point III, appellant's mistake (if such it was) was not an "honest one".

An emotional answer is found in the remarks of Prosecutor Stein at the sentencing of appellant, quoted at Point I (*supra*).

## VI.

## The Book Exhibits Were Not Seized in Violation of the First and the Fourth Amendments.

### A. Appellant Waived the Production of Officer Dimler for Examination as to the Adequacy of the Search Warrant.

Although book exhibits had been obtained at five locations: Publisher's Outlet, Midget Book Store, 37 West 20th Street, Police Files and Main Stem Book Store (see notes 1-5), at only one of these was a search warrant employed. The search warrant was issued for 37 West 20th Street.

Although multiple copies of 42 titles were taken from 37 West 20th Street, only a *single copy* of each of the 42 titles was admitted into evidence [R. 132]. The single objection made to the admission of Exhibits 1-42 was made at R. 136 when appellant's counsel said "Well, this is all, then, subject to my examination of

Lt. Dimler. It was *not* made as a formal objection and the Judge indicated he had a right to inquire—but the appellant's counsel did not thereafter press his right to inquire.

The only other objection by appellant to the admissibility of the book exhibits appears at R. 154, but that was as to the seizures which occurred at the other three locations of the Publishers Outlet, Midget Book Store and Main Stem Book Store. Those seizures were incident to lawful arrests and were made without search warrants. This objection did not relate to 37 West 20th Street.

Counsel did not thereafter ask to examine Dimler, nor did he voice any objections when exhibits 1-42 were thereafter, offered into evidence, nor did he voice any objection at the time he made his motions to dismiss [R. 674].

A reason for counsel's lack of enthusiasm on this issue is suggested in his arguments on the motion to dismiss. The charge was "possession with intent to sell" Counsel's strategy was that appellant held no possessory interest in the basement. At page 675, he argued "The evidence is beyond dispute that this defendant *had no connection whatever with that basement*" (our emphasis).

Whether the *Mapp v. Ohio* exclusionary rule is retroactive has been the subject of many decisions. In New York, it has been held that, in appeals from previous convictions reaching the appellate tribunal in the ordinary course, the *Mapp* rule must be applied. *People v. Loria*, 10 N.Y. 2d 368, 223 N.Y.S. 2d 462, 179 N.E. 2d 478. The Court of Appeals remitted the *Loria* matter to the Trial Court for a hearing.

A prerequisite to the above, however, is a showing that the objection had been raised on the pre-Mapp trial, even if by general, rather than specific, objection. *People v. O'Neill,* 11 N.Y. 2d 148, 227 N.Y.S. 2d 416, 182 N.E. 2d 95; *People v. Coffey,* 11 N.Y. 2d 142, 227 N.Y.S. 2d 412, 182 N.E. 2d 92; *People v. Yarmosk,* 11 N.Y.S. 2d 397, 230 N.Y.S. 2d 185; *People v. Wade,* 12 N.Y. 2d 61, 236 N.Y.S. 2d 36, 187 N.E. 2d 111.

The facts set forth above indicate that the appellant did not, in fact, raise a legal objection by his statement, appearing at R. 132.

When counsel for defendant voiced "no objection" to the admission of evidence allegedly obtained contrary to the principles enumerated by the United States Supreme Court in *Mapp v. Ohio,* no question of law was presented for review by any appellate court. *People v. West,* 12 N.Y. 2d 1090, 230 N.Y.S 2d 159.

**B. Norman Levenberg, the Printer Was in Possession of the Books at 37 West 20th Street and Consented to the Search.**

The United States Supreme Court has clearly indicated that the rights afforded by the Fourth and Fifth Amendments may be waived. *Zap v. U.S.,* 328 U.S. 624. This rule also applies in New York. See *People v. Kalnin,* 189 N.Y.S. 359 wherein the court held that certain defendants consented to the search of their home.

The right of one person to consent to the search of another's property derives from the authority, apparent or implied, of the one consenting. *Hook v. State,* 15 Misc. 2d 672, 181 N.Y.S. 2d 621. One having the joint use or occupancy of the premises may so consent.

*Duskill v. U.S.*, 281 Fed. 146. See also *In re Lessard*, 62 Cal. 2d, ..... 42 Cal. Rptr. 583, 399 P. 2d 39 (1965).

At the trial, appellant did not contest Levenberg's control of the basement premises at 37 West 20th Street. Levenberg testified that the police told him they were coming [R. 302]; that he had told them to pick up the books when he decided to cooperate [R. 339]; that he was there when the police arrived [R. 301]. He also testified that he put the books in the basement [R. 188] and that this was his idea [R. 371]. He had a financial interest in his "storage", having paid out 600 or 700 dollars and gotten back only a couple of hundred from appellant [R. 367]. He testified he was in control of the warehouse [R. 279].

The testimony is uncontroverted, Levenberg had complete control of the basement and consented to their coming on to the premises for the search of the premises.

At the very least, the offices had a right to take one copy of each of the book present, since Levenberg had told them to "pick up the books".

The Statement of Facts herein indicate an entirely different investigation and procedure than was exhibited in *Marcus, Mapp* or the *Kansas* case. Those cases are not in point.

**C. The Seizures From the Publisher's Outlet, Midget Book Store and Main Stem Book Store Were Incident to a Lawful Arrest and Were Not Dependent Upon the Procurement of a Search Warrant.**

The record indicates a seizure of contraband incident to a lawful arrest upon sufficient cause in a place open

to public access (See first five paragraphs of Statement of the Case). No search warrant was necessary under these facts. *New York v. Matherson,* 16 N.Y. 2d 509 (April 22, 1965); *New York v. Peskin,* 16 N.Y. 2d 511 (April 22, 1965).

**D. Counts 110 and 159 Are Not Involved in the Search and Seizure Issue.**

At page 23 of appellant's brief, Exhibit 72 is listed, in error, as within the search and seizure issue. That exhibit, "Queen Bee" was not taken from appellant's possession.

The 21 copies of "Queen Bee" were seized as contraband at the time that the 22nd copy was purchased by a New York detective. See paragraph 4 of the Statement of the Case. Their admissibility is beyond question *N.Y. v. Finkelstein,* 28 Misc. 2d 771, 218 N.Y.S. 2d 341, *N.Y. v. Matherson (supra); N.Y. v. Peskin (supra).*

Counts 110 and 159, naming "Queen Bee" are not involved in the search and seizure issue.

**Conclusion.**

The judgment below should be affirmed.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
*Counsel for Amicus Curiae.*

## APPENDIX A.

### The Female Sultan.

by Stan Drees.

Limited edition
Fully illustrated
18 chapters, 153 pages
Price: $10.00

CHARACTERS:

Letica Vale. . . . 20 years old

Velma Corley. . . . physical instructor at Mrs. Finegan's School of girls

Dr. Grant Hurd. . . . physician at girl's school

Mlle. Yvonne Gaubert. . . . French teacher at Hunter College

Roger Smythe. . . . 26 years old, ex-Marine sergeant

Wilma Innes. . . . student at Mrs. Finegan's School

Walter Snyder. . . . Book publisher

James Cousins

Rodney Wilson

Pauline

Janet Surley. . . . student at girl's school

Evelny Hurd. . . . dean of women at girl's school

Gerald. . . . 15 year old boy

CHAPTER ONE. (pp. 3 to 8)

Letica Vale, 20 years old, lives with her Uncle and Aunt and their five sons in Dakar, South Africa. She stands nude in front of a mirror, admiring her beautiful body, "the faint sweat of desire and abandon break out over her body." (p. 4) She hates her uncle, and his sons, in fact she hates men. When her uncle dies, the

family moves back to the States, and Letica is sent to Mrs. Finegan's School for Fashionable Young Ladies.

CHAPTER TWO. (pp. 10 to 19)

Dr. Grant Hurd gives a physical examination to the girls at Mrs. Finegan's School. Velma Corley, the physical education instructor, particularly notes Letica's beautiful body. To Dr. Hurd, the examination is strictly a job.

CHAPTER THREE. (pp. 20 to 26)

Velma Corley, a lesbian, when she was a student at Hunter College, fell in love with the French teacher, Mlle. Yvonne Gaubert. They were lovers, "All at once Yvonne moaned and shivered. She changed position. Velma felt an unspeakable thrill. Hitherto unknown to her . . . a new apex of delight. She had kissed a women's lips before, yes, and her breasts, and even her eyes and the lobes of her ears. But this she had never dreamed of. (cunnilingus) p. 26. When she first saw Letica, she felt no power on earth could keep her from seducing the girl.

CHAPTER FOUR. (pp. 27 to 44)

Letica is aware of Velma Corley's lesbianism, "considering the fact that everytime she was in Miss Velma's presence the woman did nothing but look at her with hot eyes." (p. 27) "Letica was a virgin, but wanted a man first before she was sidetracked 'on that branch' of passion's offbeat highway." (p. 28) One night, Letica sneaks off campus, and goes to a roadhouse nearby that is off limits for all students at Mrs. Finegan's School. Pages 32 to 34 describe Letica having intercourse with Roger Smythe, 26 years old and an ex-

Marine sergeant. He is amazed to find that Letica is a virgin. He wants her to marry him even though he doesn't even know her name. Letica thinks what bliss she would get from smashing a whip against the 'writhing naked flesh of some other human being." (p. 33) She promises to meet Roger the next night.

CHAPTER FIVE. (pp. 36 to 44)

Velma Corley keeps thinking of Letica's lovely lush body. Pages 39 to 44 describe Velma seducing Wilma Innes, a young student at the school. She was wishing all the time it was Letica. Wilma spent each night in bed with Velma. "Velma found that Wilma would let her do anything she wished." (p. 43)

CHAPTER FIVE. (should be chapt. 6, pp. 45 to 54)

Letica meets Walter Snyder, a book publisher at a local restaurant. She has written a book, and Walter tells her if she will come to his apartment he will buy her book. Pages 49 to 53 describe them nude in his bedroom, while Letica beats him with his belt. "Here", he said, reaching her the heavy, leather belt, "take this, and beat the living crap out of me." (p. 50) After beating him until the blood flows, they have intercourse. (p. 52)

CHAPTER EIGHT. (should be chapt. 7, pp. 55 to 62)

This chapter gives the outline of Letica's book. The story takes place in a concentration camp for women in Germany, Camp Labor via Rapture. It is run by a man by the name of Krueger. He beats the girls to death if they disobey. Page 59 describes him beating to death Frieda of Warsaw, with a shovel handle.

CHAPTER NINE. (pp. 63 to 91)

Pages 67 to 77 are illustrated drawings of perverted acts. This chapter describes more atrocities on the young girl inmates of Camp Labor via Rapture in Letica's book. It tells of Gretchen, the Camp Commander, who is unable to attract any of the German soldiers who come to fondle the girl prisoners in their Enjoyment duty. "Every so often Gretchen gets hold of one of the girls, drags her into her room, drinking into her nostrils the scent of the man who had just detached himself from the girl." (p. 66) The girls are tied to stools naked, and then flogged to death when they disobey. (p. 83) On "satisfaction duty" 50 girls are strapped naked, each to a bed, while German soldiers have intercourse with them. (p. 86) Letica knew her book was good writing. She receives $1500.00 from Walter Snyder, and will get $5000.00 more when she finishes it. She plans to rent an apartment and "have all kinds of exotic instruments of torture." (p. 91)

CHAPTER TEN. (pp. 92 to 101)

Letica rents an apartment, and buys herself some leather garments and high spike heels. She runs an ad, "Stern lady tutor desires male students in English and Manners. No laggards or shrinkers from discipline need apply. Results guaranteed in the shortest possible time. Madame L. Sternley." (p. 93) She receives 32 answers. She selects one letter and invites James Cousins to be the first student. Pages 98 to 101 describe Letica dressed in her leather clothes and high spike heels, beating "the living crap" out of James Cousins, who is completely nude. She sinks to the bed in exhaustion, and the man, his body streaked with blood, per-

forms an act of cunnilingus on her as she continues to beat him with her strong right arm. (p. 101)

CHAPTER ELEVEN. (pp. 102 to 104)

When Letica goes back to her school to pick up her belongings, she inadvertently walks in on Velma Corley and Wilma Innes. They are lying nude on the bed. Velma performs an act of cunnilingus on Wilma, "Velma on her knees with Wilma's thighs resting on her shoulders." (p. 103) Letica hits them with both hands, "landing about ten blows on each fanny." (p. 103) She enjoys this sensation so much that she leaves realizing "it is just as pleasureable to spank the naked bottoms of a woman, as it was to splay a whip against a man's flesh." (p. 104)

CHAPTER TWELVE. (pp. 105 to 114)

Letica receives a letter from Rodney Wilson, a friend of James Cousins, who tells her "he will give her $50.00 if she succeeds in beating him into unconsciousness." (p. 106) When he arrives Letica ties him over the end of her bed, beating him into unconsciousness. She enjoys this pleasure so much that she decides to put another ad in the paper for stronger men. When Rodney regains consciousness, he tells her how wonderful she is. He gives her $50.00 and leaves. She decides to "go on the prowl" the next day for a female victim. (p. 114)

CHAPTER FOURTEEN.
(no chapt. 13, pp. 115 to 126)

In searching for her female victim, Letica sees a group of women flocking into a building. She joins them. The woman speaker goes into detail on how

to get an hourglass figure by being tightly laced in a corset. Letica meets a woman, named Pauline who admires her high leather boots. Letica invites her to the apartment. She dopes her drink with a few drops of chloral hydrate. Pages 125 to 126 describe Letica spanking Pauline's bare buttocks after she has passed out. Pauline comes to "moaning urgently now, strange sounding orgiastic whimpers, and her body was undulating most determinedly . . . for Pauline the pain had quickened into exquisite ecstasy." (p. 126)

CHAPTER FIFTEEN. (pp. 127 to 134)

Janet Surley is caught sneaking into her room at the girl's school by Miss Evelny Hurd, Dean of women. Miss Hurd promises not to report her if she comes to her room the next day after school. Pages 130 to 134 describe Miss Hurd beating Janet, who is faced against the wall and nude. She beats her with a rubber hose for a full fifteen minutes, "Somehow the lashes had become as subtly exciting as caresses." (p. 133) Janet dresses, and Miss Hurd asks her to kiss her before she leaves. The next week Janet sneaks out again to see her fiance Fred, and when she returns, Miss Hurd is waiting for her.

CHAPTER SIXTEEN. (pp. 135 to 140)

Pages 138 to 140 describe Letica spanking 15 year old Gerald, while his father watches. Gerald resists at first, but then obviously enjoying it as much as his father was enjoying watching it. It was more pleasant than Letica anticipated "to be fondled by a teen-age boy while she beat his bottoms into a glorious shade of dark red with her naked hand." (p. 140)

## CHAPTER SEVENTEEN. (pp. 141 to 147)

Letica receives a letter from James Cousins begging her to let him see her in her red thigh boots and white ermine cape he bought her. She writes him if he will sign a document to be her slave body and soul (such as Wanda Von Dunajew had signed in the history of Leopold Von Sachermasoch) she would agree to see him. He agrees, and she thinks of perverted ideas to "work him over." (p. 147) (Page 146 has a grotesque illustrated perversion that does not have anything to do with the story.)

## CHAPTER EIGHTEEN. (pp. 148 to 153)

Another letter from James Cousins, signed "your devoted slave" gives Letica great joy, because she was "a woman who in spite of my cruelness to him, would still be slavishly adored by him." (p. 150) She dreams James is beating her, and when she awakens she finds that "she had actually beaten herself in all the spots she could reach." (p. 153) She was so happy, it was exquisite joy to be mistress of all she surveyed. "She, Letica, had made of herself, even as she had dreamed she would, a Female Sultan."

THE END.

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IN THE

# Supreme Court of the United States

October Term, 1965

No. 49

EDWARD MISHKIN,
*Appellant,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,
*Appellee.*

## BRIEF FOR APPELLEE

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# TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| QUESTIONS PRESENTED | 2 |
| THE STATUTE INVOLVED | 2 |
| STATEMENT | 5 |
| THE EVIDENCE | 9 |
| A. The Exhibits | 9 |
| The Covers | 9 |
| The Contents | 10 |
| B. The Trial | 11 |
| The People's Case | 11 |
| Seizure of the Books and Procurement of Drawings Reproduced Therein | 11 |
| Preparation of the Books | 15 |
| Production and Distribution of the Books | 20 |
| Corroboration | 28 |
| The Defense | 37 |
| SUMMARY OF ARGUMENT | 38 |
| POINT I—The materials underlying the conviction enjoy no constitutional protection, for they are obscene according to the appropriate standards, judges, and audiences for measuring that concept | 40 |

PAGE

POINT II—"Sadistic" and "masochistic" materials are not inherently distinct from obscenity, nor are those words, or the word "obscene" unconstitutionally vague ..... 55

POINT III—Proscribing dissemination of obscenity is a legitimate objective of legislation ..... 63

POINT IV—The constitutional requirement of scienter was conclusively established by the proof at the trial ..... 66

POINT V—The exhibits were lawfully seized ..... 74

Concerning the Seizure from the Warehouse ..... 74

Concerning the Seizures at the Bookstores ..... 79

CONCLUSION ..... 85

## TABLE OF AUTHORITIES

PAGE

*Cases:*

Abel v. United States, 362 U. S. 271 (1959) ..... 78
Agnello v. United States, 269 U. S. 20 (1925) ..... 80
Alberts v. California, 354 U. S. 476 (1957) ..... 41
Alexander v. United States, 271 F. 2d 140 (8th Cir. 1959) ..... 68
Amos v. United States, 255 U. S. 313 (1920) ..... 76
A Quantity of Books v. Kansas, 378 U. S. 205 (1964) ..... 81, 82, 83

Batten v. United States, 188 F. 2d 75 (5th Cir. 1951) 79
Bowles v. Chew, 53 F. Supp. 787 (D. C. Cal. 1944) ..... 77
Brinegar v. United States, 338 U. S. 160 (1949) ..... 84

Calhoun v. United States, 172 F. 2d 457 (5th Cir. 1949) ..... 77
California v. Harris, 192 Cal. App. 2d 887 (1961) ..... 68
California v. Williamson, 207 Cal. App. 2d 839 (1962) 68
Carrol v. United States, 267 U. S. 132 (1925) ..... 84
Chapman v. United States, 365 U. S. 610 (1961) ..... 78
Chicago v. Doe, 47 App. 2d 460, 197 N. E. 2d 711 (1964) ..... 68
Cincinnati v. King, 168 N. E. 2d 633 (1960) ..... 68
Commonwealth v. Friede, 271 Mass. 318, 171 N. E. 472 (1930) ..... 41
Commonwealth v. Holmes, 17 Mass. 336 (1821) ..... 41
Commonwealth v. McCance, 164 Mass. 162, 41 N. E. 133 (1895) ..... 41
Commonwealth v. Sharpless, 2 S & R 91 (Pa. Sup. Ct. 1815) ..... 41
Connecticut v. Andrews, 150 Conn. 103, 186 A. 2d 546 (1962) ..... 68
Connecticut v. Cercone, 2 Conn. Cir. 144, 196 A. 2d 439 (1963) ..... 68

PAGE

Curry v. United States, 192 F. 2d 571 (5th Cir. 1951) 76
Cutting v. United States, 169 F. 2d 951 (9th Cir. 1948) 77

Driskell v. United States, 281 F. 146 (9th Cir. 1922) .... 76

Ellison v. United States, 206 F. 2d 476 (D. C. Cir. 1953) ..... 80

Fisher v. United States, 205 F. 2d 703 (D. C. Cir. 1953) ..... 80
Fried, Application of, 68 F. Supp. 961 (D. C. N. Y. 1946) ..... 77

General Trust Co. v. Blodgett, 287 U. S. 509 (1932) .... 57
Gillars v. United States, 182 F. 2d 962 (D. C. Cir. 1950) ..... 77
Grove Press v. Gerstein, 378 U. S. 577 (1964) ..... 63

Hester v. United States, 265 U. S. 57 (1934) ..... 80

Jacobellis v. Ohio, 378 U. S. 184 (1964) .....42, 43, 58, 62, 69

Kahm v. United States, 300 F. 2d 78 (5th Cir. 1962) 68
Kaplan v. Peyser, Matter of, 273 N. Y. 147 (1937) .... 61
Kingsley Books Inc. v. Brown, 354 U. S. 436 (1957) .... 82
83, 85
Kingsley Pictures Corp. v. Regents, 360 U. S. 684 (1959) ..... 57

Lustig v. United States, 338 U. S. 74 (1949) ..... 78

Manual Enterprises v. Day, 370 U. S. 478 (1962) .....42, 43
45, 47
Manual Enterprises v. Day, 289 F. 2d 455 (D. C. Cir. 1961) ..... 47
Mapp v. Ohio, 367 U. S. 343 (1961) ..... 80

PAGE

Marcus v. Search Warrants, 367 U. S. 717 (1961) ... 81, 82, 83
Missouri v. Vollmer, 389 S. W. 2d 20 (1965) ... 68

Nash v. United States, 229 U. S. 373 (1912) ... 70
Nebraska v. Jungclaus, 176 Neb. 641, 126 N. W. 2d 858 (1964) ... 68

Parmelee v. United States, 113 F. 2d 729 (D. C. Cir. 1940) ... 49
People v. Brooklyn News Co., 12 Misc. 2d 768 (Kings Co. 1958) ... 57
People v. Cataneo, 126 N. E. 2d 692, 6 Ill. 2d 122 (1955) ... 81
People v. Defore, 242 N. Y. 13 (1926) ... 81
People v. Eastman, 188 N. Y. 478 (1907) ... 61
People v. Finkelstein, 11 N. Y. 2d 300 (1962) ... 50, 53, 68
People v. Finkelstein, 9 N. Y. 2d 342 (1961) ... 66
People v. Friola, 11 N. Y. 2d 157 (1962) ... 79
People v. Fritch, 13 N. Y. 2d 577 (1964) ... 62
People v. Hicks, 331 P. 2d 1003, 165 Cal. App. 2d 548 (1959) ... 78
People v. Matherson, 16 N. Y. 2d 509 (1965) ... 80, 85
People v. Mishkin, 15 N. Y. 2d 671 (1964) ... 1, 6, 57
People v. Mishkin, 17 App. Div. 2d 243 (1st Dept. 1962) ... 1, 6
People v. Mishkin, 26 Misc. 2d 152 (N. Y. Co. 1960) 1
People v. Muller, 96 N. Y. 408 (1884) ... 61
People v. Peskin, 16 N. Y. 2d 511 (1965) ... 80
People v. Reshes, 39 Misc. 2d 723 (N. Y. Co. 1963) ... 81
People v. Richmond County News, 9 N. Y. 2d 578 (1961) ... 53, 62, 69
People v. Schenkman, 20 Misc. 2d 1093 (1960) ... 81
People v. Wepplo, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947) ... 68
People v. Wilson, 16 App. Div. 2d 207 (1st Dept. 1962) 79
People v. Winters, 294 N. Y. 545 (1946) ... 61
Price v. United States, 165 U. S. 311 (1897) ... 68

PAGE

Regina v. Hicklin, L. R. 3 Q. B. 360 (1868) ..... 41, 44
Regina v. Reed, Fortescue 98, 92 Eng. Rep. 777 (1708) 41
Reszutek v. United States, 147 F. 2d 142 (2d Cir. 1945) ..... 77
Rex v. Curl, 2 Strange 788, 93 Eng. Rep. 849 (K. B. 1727) ..... 41
Rosen v. United States, 161 U. S. 29 (1896) ..... 67, 68
Roth v. United States, 354 U. S. 476 (1957) ..... 2, 41, 42, 43, 45 46, 47, 48, 53, 58 62, 69, 71, 84, 85
Rouss, Matter of, 221 N. Y. 81 (1917) ..... 61

Schindler v. United States, 208 F. 2d 289 (9th Cir. 1953) ..... 68
Smith v. California, 361 U. S. 147 (1959) ..... 50, 66, 67 70, 71, 72
State v. Hudson County News, 41 N. J. 247, 196 A. 2d 225 (1963) ..... 68
Stein v. United States, 166 F. 2d 851 (4th Cir. 1948) 77
Stoner v. California, 376 U. S. 483 (1964) ..... 78
Stromberg v. California, 283 U. S. 359 (1931) ..... 53
Swearingen v. United States, 161 U. S. 446 (1896) ..... 61

United States v. Antonelli Fireworks Co., 155 F. 2d 631 (2d Cir. 1946) ..... 77
United States v. Chesman, 19 F. 497 (E. D. Mo. 1881) 49
United States v. Eldridge, 302 F. 2d 463 (4th Cir. 1962) ..... 77

United States v. Goodman, 190 F. Supp. 847 (N. D. Ill. 1961) ..... 77
United States v. Heine, 149 F. 2d 485 (2d Cir. 1945) 77
United States v. Hockman, 277 F. 2d 631 (2d Cir. 1960) ..... 68
United States v. Jeffers, 342 U. S. 48 (1951) ..... 78

PAGE

United States v. Klaw, —— F. 2d —— (decided July 15, 1965) ..... 50, 51, 56
United States v. Lee, 274 U. S. 559 (1927) ..... 80, 81
United States v. Lefkowitz, 285 U. S. 452 (1932) ..... 80, 81
United States v. Levine, 83 F. 2d 156 (2d Cir. 1936) 48
United States v. Oakley, 290 F. 2d 517 (6th Cir. 1961) 68
United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S. D. N. Y. 1933) ..... 41
United States v. One Package, 86 F. Supp. 737 (2d Cir. 1936) ..... 49
United States v. One Unbound Volume, etc., 128 F. Supp. 280 (D. C. Md. 1955) ..... 49
United States v. Peisner, 311 F. 2d 94 (4th Cir. 1962) ..... 81, 82, 84
United States v. Petrillo, 332 U. S. 1 (1947) ..... 58
United States v. Rabinowitz, 339 U. S. 56 (1950) ..... 80
United States v. Rellie, 39 F. Supp. 21 (D. C. N. Y. 1941) ..... 79
United States v. Sergio, 21 F. Supp. 533 (D. C. N. Y. 1937) ..... 77
United States v. Sferas, 210 F. 2d 69 (9th Cir. 1954) 76
United States v. Smith, 45 F. 476 (D. C. Wisc. 1891) 49
United States v. 31 Photographs, 156 F. Supp. 350 (S. D. N. Y. 1957) ..... 48
United States v. Walker, 190 F. 2d 481 (2d Cir. 1951) 77
United States v. Warraington, 17 F. R. D. 25 (D. C. Cal. 1955) ..... 79

Williams v. Oklahoma, 358 U. S. 576 (1959) ..... 57
Winters v. New York, 333 U. S. 507 (1946) ..... 60, 61
Wisconsin v. Chobot, 12 Wisc. 2d 110, 106 N. W. 2d 286 (1960) ..... 68

PAGE

***Constitution and Statutes:***

American Law Institute, Model Penal Code, Sec. 207.10 (2) (1957) ..... 46
American Law Institute, Model Penal Code, Sec. 207.10 (7) (1957) ..... 73
American Law Institute, Model Penal Code, Sec. 251.4 (1962) ..... 52

New York General Business Law, Sec. 330 ..... 5, 6
New York Penal Code, Sec. 1141 ..... 2, 5, 55, 56, 60, 61, 63
New York (future) Penal Code, Sec. 235.001 (effective Sept. 1, 1967) ..... 47

United States Code, Title 18, Sec. 1461 ..... 56
United States Constitution, Amend. I ..... 82, 83
United States Constitution, Amend. IV ..... 2, 81, 82, 84

***Books and Periodicals:***

Caprio, Variations in Sexual Behavior (1957) ..... 49

Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. Pa. Law Rev. 834 (1964) ..... 47

Indiana University Institute for Sex Research, Sexual Behavior of the Human Female ..... 49

Kalvan, The Metaphysics of the Law of Obscenity, 1 Supreme Court Review (1960) ..... 63

Lockhart and McClure, Obscenity: The Developing Constitutional Standard, 45 Minn. L. Rev. 5 (1960) ..... 46, 47

New York Legislative Documents, vol. 3 (1956) ..... 49, 56, 57, 60

Paul and Schwartz, Federal Censorship (1961) ..... 52

IN THE

# Supreme Court of the United States

**October Term, 1965**

**No. 49**

EDWARD MISHKIN,

*Appellant,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Appellee.*

## BRIEF FOR APPELLEE

### Opinions Below

The opinion of the trial court is reported at 26 Misc. 2d 152 (R. 720-8).* The opinion of the Appellate Division, concerned however with an aspect of the case not presented on this appeal, is reported at 17 App. Div. 2d 243 (1st Dept. 1962). The affirmance of the Court of Appeals, without opinion, is reported at 15 N. Y. 2d 671 (1964).

* References, unless otherwise indicated, are to the printed pages of the trial record.

## Questions Presented

1. Are the exhibits published and possessed by the appellant obscene under applicable constitutional principles?
2. Is material which appeals to the prurient interests of sexual deviants, rather than the "average man," obscene within the meaning of the *Roth* formulation?
3. Is Section 1141 of the New York Penal Law unconstitutional for vagueness of the terms "obscene," "sadistic," and "masochistic"?
4. Does the constitutional requirement of scienter include knowledge that the materials in question are obscene under the law?
5. Is material lawfully seized under the Fourth Amendment when it is acquired with the consent of an accomplice in actual physical possession and control?
6. Is a seizure from a store of books offered for sale to the public constitutional when made incident to an arrest for their possession, but without a prior adversary hearing as to their obscenity?

## The Statute Involved

**"Section 1141. Obscene Prints and Articles**

"1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, or advertise in any manner,

or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, card, phonograph record, picture, drawing, photograph, motion picture film, figure, image, phonograph record or wire or tape recording, or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, poses for, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, photograph, motion picture film magazine, pamphlet, newspaper, story, writing, paper, card, phonograph record, figure, image recording, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, lascivious filthy, disgusting or indecent books, picture, photograph, motion picture film, writing, paper, card, phonograph record, figure, image, recording, matter, article or thing, named in this section can be purchased, obtained or had or who has in his possession, any slot machine, motion picture projector or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawings, image, recording, article or object, or who shows, advertises, exhibits or transmutes

the same, or causes the same to be shown, advertised, exhibited or transmuted, or who buys, owns or holds any such machine with the intent to show, advertise, transmute, or in any manner exhibit the same; provided, that this subdivision shall not apply to motion picture films licensed by the state department of education; or who

"2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

"Is guilty of a misdemeanor, * * *

"4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section.

"5. The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section."

## Statement

On March 8, 1960, the District Attorney of New York County, pursuant to the direction of a grand jury, filed in the Court of Special Sessions of the City of New York, County of New York, a one hundred ninety-eight count information against the defendant (R. 3-119).

The first sixty-two counts charged the defendant with possessing obscene books with intent to sell (Penal Law, §1141), counts 63 through 110 charged unlawfully publishing obscene books (*ibid.*), counts 111 to 159 charged unlawfully hiring others to prepare obscene books (*ibid.*), and counts 160-198 charged failing to print the publisher's and printer's name and address (Gen. Bus. Law, §330). Seventy-two books formed the basis upon which the various counts were predicated.

At the commencement of the trial, counts 33 through 36, as well as counts 54, 55, 62, 94, 105, 143, 154, 191 and 195 were dismissed on motion of the district attorney (R. 120).

On December 14, 1960, after trial in the Court of Special Sessions of the City of New York, County of New York (Gassman, Breslin, and Galloway, JJ.), Mishkin was found guilty of one hundred and seventy-three of the remaining counts: fifty-four crimes of Unlawfully Possessing Obscene Books With Intent to Sell (Penal Law, §1141); forty-three crimes of Unlawfully Publishing Obscene Books (*ibid.*); forty-three crimes of Hiring Others to Prepare Obscene Books (*ibid.*); and thirty-three crimes of Failing to Print Publisher's and Print-

ER'S NAME AND ADDRESS (Gen. Bus. Law, §330) (R. 121-2, R. 699-700, R. 718-19). The defendant was sentenced to serve penitentiary terms aggregating three years, and, in addition, fines totalling twelve thousand five hundred dollars were imposed (R. 121-2, R. 718-19).

On Appeal, the Appellate Division, First Department, modified the judgment by dismissing the counts based on a violation of the General Business Law [*People* v. *Mishkin*, 17 App. Div. 2d 243 (1962)], and affirmed the judgment with respect to the remaining one hundred and forty counts. The Court of Appeals affirmed the order of the Appellate Division [15 N. Y. 2d 671 (1964)].

In the following chart, extracted from Court's Exhibit A, there is set forth a schedule of the books with the relevant counts in the information upon which the defendant presently stands convicted.

## TITLES OF EXHIBITS FOUND OBSCENE AND COUNTS IN INFORMATION COVERING EACH OF THE EXHIBITS

| *Exhibit* | *TITLE* | COUNTS IN INFORMATION | | |
|---|---|---|---|---|
| | | *Possession* | *Publishing* | *Hiring Others* |
| 1 | Chances Go Around | 1 | 63 | 111 |
| 2 | Impact | 2 | 64 | 112 |
| 3 | Female Sultan | 3 | 65 | 113 |
| 4 | Satin Satellite | 4 | | |
| 5 | Her Highness | 5 | 67 | 115 |
| 6 | Mistress of Leather | 6 | 68 | 116 |
| 7 | Educating Edna | 7 | 69 | 117 |
| 8 | Strange Passions | 8 | 70 | 118 |
| 9 | The Whipping Chorus Girls | 9 | 71 | 119 |
| 10 | Order Of The Day and Bound Maritally | 10 | 72 | 120 |
| 11 | Dance With the Dominant Whip | 11 | 73 | 121 |
| 12 | Cult Of The Spankers | 12 | 74 | 122 |
| 13 | Confessions | 13 | 75 | 123 |
| 14 & 46 | The Hours Of Torture | 14 & 40 | 76 | 124 |
| 15 & 47 | Bound In Rubber | 15 & 41 | 77 | 125 |
| 16 & 48 | Arduous Figure Training at Bondhaven | 16 & 42 | 78 | 126 |
| 17 & 49 | Return Visit To Fetterland | 17 & 43 | 79 | 127 |
| 18 | Fearful Ordeal In Restraintland | 18 | 80 | 128 |
| 19 & 50 | Women In Distress | 19 & 44 | 81 | 129 |
| 20 & 54 | Pleasure Parade No. 1 | 20 & 48 | 82 | 130 |
| 21 & 57 | Screaming Flesh | 21 & 51 | 86 | 134 |
| 22 & 58 | Fury | 22 & 52 | | |
| 23 | So Firm So Fully Packed | 23 | 87 | 135 |
| 24 | I'll Try Anything Twice | 24 | | |

| *Exhibit* | *TITLE* | COUNTS IN INFORMATION | | |
|---|---|---|---|---|
| | | *Possession* | *Publishing* | *Hiring Others* |
| 25 & 59 | Masque | 25 & 53 | | |
| 26 | Catanis | 26 | | |
| 27 | The Violated Wrestler | 27 | 89 | 137 |
| 28 | Betrayal | 28 | | |
| 29 | Swish Bottom | 29 | 90 | 138 |
| 30 | Raw Dames | 30 | 91 | 139 |
| 31 | The Strap Returns | 31 | 92 | 140 |
| 32 | Dangerous Years | 32 | 93 | 141 |
| 43 | Columns of Agony | 37 | 95 | 144 |
| 44 | The Tainted Pleasure | 38 | 96 | 145 |
| 45 | Intense Desire | 39 | 97 | 146 |
| 51 | Pleasure Parade No. 4 | 45 | 85 | 133 |
| 52 | Pleasure Parade No. 3 | 46 | 84 | 132 |
| 53 | Pleasure Parade No. 2 | 47 | 83 | 131 |
| 55 | Sorority Girls Stringent Initiation | 49 | 98 | 147 |
| 56 | Terror At The Bizarre Museum | 50 | 99 | 148 |
| 60 | Temptation | 57 | | |
| 61 | Peggy's Distress On Planet Venus | 58 | 101 | 150 |
| 62 | Ways of Discipline | 59 | 102 | 151 |
| 63 | Mrs. Tyrant's Finishing School | 60 | 103 | 152 |
| 64 | Perilous Assignment | 61 | 104 | 153 |
| 68 | Bondage Correspondence | | 107 | 156 |
| 69 | Woman Impelled | | 106 | 155 |
| 70 | Eye Witness | | 108 | 157 |
| 71 | Stud Broad | | 109 | 158 |
| 72 | Queen Bee | | 110 | 159 |

## The Evidence

### A. The Exhibits

The books in evidence consist of fifty different titles. The probative force of the exhibits is twofold. An analysis of the apparent characteristics of the material is pertinent to a finding of scienter. The contents of the exhibits, of course, are the substance of the crime charged.

#### *The Covers*

The jackets and backing of most of the exhibits have illustrations which relate to the subject matter of the book. The covers of about nineteen of the books display women being whipped, beaten, tortured or abused (Exhs. 3, 4, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 31, 51, 52, 53, 55, 56). Practically all the book jackets depict symbols associated with fetishism (Exhs. 7, 9, 24, 45, 53 do not). One jacket depicts a lesbian seduction scene (Exh. 71, *Stud Broad*). Numerous exhibits display partially clothed or nude women whose breasts and buttocks are greatly exaggerated (see e.g., 2, 5, 12, 13, 23, 25, 26, 29, 46, 49, 55, 69, 71, 72). In addition to the illustrations, the book jackets also reflect the titles in large print. A few of the more colorful titles are: *Screaming Flesh* (Exhs. 21 & 57), *The Dance with the Dominant Whip* (Exh. 11), *Cult of the Spankers* (Exh. 12), *Bound in Leather* (Exh. 47), *Fearful Ordeal in Restraintland* (Exh. 18) and *The Strap Returns* (Exh. 31).

It is noted that some of the books have been printed in foreign countries (Exhs. 11, 12) and are restricted to a limited group of subscribers (Exhs. 1, 3, 5, 6, 8, 13, 29, 57). Typical cover blurbs are: "For Sophisticated Collectors

of the Unusual," and "a novel of bondage," "The Story of the Creation of a Lesbian" and "The Unusual Story of a Woman Flagellant" (Exhs. 8, 29, 57, 71).

Although all of the books are paper-bound "pulps," most of the exhibits are marked to sell at exorbitant prices [see *e.g., Confession* (Exh. 13, 127 pp. at $15.00); *Chances Go Round* (Exh. 1, 50 pp. at $10.00); *Female Sultan* (Exh. 3, 150 pp. at $10.00)]. Fifteen other books sell for either four or five dollars and all contain less than one hundred and sixty pages (Exhs. 2, 4, 25, 26, 27, 28, 29, 30, 57, 60, 69, 70, 71, 72, 73).

***The Contents***

The contents of this material are not easily categorized. The dominant theme of the matter is obvious. Subordinate themes, however, run across classification lines and indicate that the subject has multiple sexual elements interwoven. These elements may be roughly denominated as dealing with sado-masochism, fetishism, homosexuality and miscellaneous other sexual aberrations.

A large group of the exhibits may be denominated bondage or sado-masochistic books [Exhs. 3, 14, 15, 16, 17, 18, 19, 20, 21, 51, 52, 53, 55, 56, 61, 62, 63, 64, 68]. This group of exhibits is predominantly devoted to depicting pictorially and verbally innumerable scenes in which individuals are being tortured in varied and fantastic ways. In these sado-masochistic scenes, the victims of the many and varied atrocities are usually referred to as being in bondage or slavery. The victims, moreover, although portrayed in agony, experience pleasure. Sexual fetishism is also

prevalent, being represented, for instance, by "spike" type heels, leather boots, excessively tight clothing, black gloves, whips, masks and corsets.

The "spanking" exhibits involve mistreatment of the victims which is slightly less destructive (Exhs. 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 43, 44, 45). However, these exhibits all deal in great detail with whippings, beatings and spankings. Some are illustrated with pictures of the various punishments and the devices utilized. Others are more concerned with the incidents of sexual seduction, transvestism and fetishism which are liberally interspersed throughout the sado-masochistic "chastisements."

The final group of exhibits present multiple and particularized incidents of sexual seduction (homosexual and heterosexual), sodomy, rape, and masturbation [Exhs. 2, 3, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 60, 69, 70, 71, 72].

## B. The Trial

### The People's Case

#### *Seizure of the Books and Procurement of Drawings Reproduced Therein*

Inspector **George Plansker** of the First Deputy Commissioner's Office of the New York City Police Department testified that, at about 1:00 p.m. on January 12, 1960, while on active police duty, he and five other police officers proceeded to the basement of a loft building located at 37 West 20th Street, New York County, to execute a search warrant (R. 133-4).

In the basement, the inspector observed, in addition to an oil burner, a "large room—a bunker" twenty-five feet by thirty feet, twelve feet in height and enclosed by brick except for one opening—thirty inches by thirty inches—which had a metal door (R. 134, 136-7).

Opening the metal door, the inspector saw a quantity of books and magazines and seized them (R. 134). The process of removing the books encompassed the better part of two days, the room being secured in the inspector's absence by uniformed police officers (R. 137). As the books were removed by the inspector's subordinates, several lieutenants noted the various titles with the number of each. The books were then wrapped and sealed in cartons (R. 136).

At this point in his testimony, the inspector stated that Exhibits 1 through 42, inclusive, were among the books seized on those days (R. 137-8). He further testified concerning the number of each title seized—which in many instances numbered in the hundreds (R. 139-43).

Prior to these events, Inspector Plansker further testified, at approximately 12:30 p.m., on December 29, 1959, he and four officers entered The Publishers Outlet Store, a bookstore located at 250 West 42nd Street, New York County (R. 143-4). The inspector described the premises as a "large store with numerous shelves and racks displaying books and magazines." Between the time of entry and 4:00 p.m., the officers seized a quantity of books and magazines (R. 144). The inspector identified Exhibits 43 through 67 as some of the books obtained at that time (R. 144-50). On cross-examination the inspector noted that

one Cosky and two others were arrested by him in Publishers Outlet that day (R. 156-7).

Also on the same date—December 29, 1959—the inspector and his officers entered Midget Book Shop located at 228 West 42nd Street, New York County (R. 150). The shop was "a small store containing shelves and racks upon which were displayed books and magazines" (R. 150). The officers there seized a quantity of books and magazines among which was included Exhibit 68 (R. 151).

In connection with the events in the Midget Book Store, Inspector Plansker testified that, after he had been in the shop about a half-hour, Mishkin opened the door of the store (R. 151-2). At this point, a Mr. Schenkman, who was in charge of the store and under arrest at the time, went to the door and spoke to the defendant (R. 153, 160). Concluding the conversation, Schenkman then spoke to the inspector (R. 152). After that, the inspector left the store and looked for Mishkin on 42nd Street. The inspector found him inside the book shop, Publishers Outlet (R. 152). The defendant made no statement to the inspector or to other officers relating to the property found in the Midget Book Store or in Publishers Outlet (R. 152).

Approximately two months later, at about 12:45 p.m., on February 10th, 1960, the inspector entered The Main Stem Book Store, 1607 Broadway, New York County, which the inspector described similarly to the other stores (R. 153). There, the inspector procured books among which were Exhibits 69 through 71 (R. 154-5).

On cross-examination, Inspector Plansker testified that he had had the building located at 37 West 20th Street

under observation for several weeks prior to the seizure of the books in the basement on January 12, 1960, and that Levenberg, a printer in the building, had used the bunker room in the basement as a storeroom (R. 157-160). Likewise, the inspector had had Publishers Outlet under observation for several weeks prior to his entry on December 29, 1959 (R. 159).

Detective **Edward Gurnewald** of the Police Commissioner's Confidential Investigating Unit, of the New York City Police Department, testified that, while on active police duty on December 30, 1958, he entered the Publishers Outlet Store, 254 West 42nd Street (R. 163). Inside the store, the officer, upon observing copies of a book entitled *Queen Bee* (Exh. 72), purchased a copy and arrested one Herman Schenkman (R. 164, 165-6). The officer then seized twenty-two more copies of the book (Exh. 72) which were on display (R. 164).

Detective **Herbert C. Hurley** of the New York City Police Department, assigned to the New York County District Attorney's Office, testified that, at 3:30 p.m., on January 22, 1960, he had a meeting with Mr. Louis N. Field, an attorney representing Norman Levenberg, in Room Number 707 at 220 West 42nd Street (R. 166-7). After the detective had a conversation with the attorney, the latter made a telephone call. Concluding the telephone call, the attorney handed the detective a shopping bag containing a series of artist's sketches (Exhs. 1A-L, 4A, 21A, 23A and B, 24A, 25A and B, 26A, 28A, 29A, 30A, 34A, 37A, 60A, 70A, 71A, 72A) as well as three slips of paper (Exhs. 73A, B and C) (R. 167-172).

***Preparation of the Books***

**Hyman Rosen,** a writer for twenty years, testified that he had known the defendant since 1954 (R. 395). The witness identified Exhibit 24 as a book which he wrote under the pseudonym "John Thomas" for the defendant at Mishkin's request in 1957 (R. 395-6). Relative to the preparation of the book, the defendant had told Rosen to "spice it up and bring it in" (R. 396). The defendant paid the witness either one or two hundred dollars in cash for the book at the former's store—"Outlet"—on 42nd Street (R. 397).

Exhibits 35 and 36 (Exhibit 65 being an additional copy of 36) were written by the witness for himself as publisher in 1954 (R. 397-8). In September 1957, Rosen sold both books to Mishkin for four hundred dollars in cash, each at Publishers Outlet on West 42nd Street (R. 398-9). The witness utilized the pseudonym "Colin Ross" in writing the books (R. 399).

Acknowledging that he also used the pseudonym "Harry Roskolenko," Rosen identified Exhibit 74 as a contract entered into between Mishkin and himself (R. 399-401). The defendant's signature thereon was executed by Mishkin in the presence of the witness; the latter signed it using the name "Harry Roskolenko" (R. 400-1).

The contract, dated September 3, 1957, stated that the witness had sold for four hundred dollars his novel about Indo China to the defendant (Exh. 74). It stipulated that the witness' name "Harry Roskolenko" would not appear as author, but that the pseudonym "Colin Ross" would be

used instead. It further stated that the title of the novel would be one of several listed names (R. 400-1)—one which, in fact, is the title of Exhibits 35 and 36.

**Leotha Hackshaw**, a writer, testified that she had known Mishkin for approximately three or four years (R. 407-9).

The witness identified Exhibit 26 as a book she had written for the defendant "around the Fall of '57" (R. 408-9). Relative to the preparation of the book, Mishkin told the witness that he wanted a book "full of sex scenes and lesbian scenes * * * the sex had to be very strong, it had to be rough, it had to be clearly spelled out * * * I had to write sex very bluntly, make the sex scenes very strong * * * the sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men * * * he [Mishkin] wanted scenes in which women were making love with women * * * he wanted sex scenes in which they [*sic*] were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men were making love to men, and they [*sic*] were spankings and scenes—sex in an abnormal and irregular fashion" (R. 409-412).

Upon completion of Exhibit 26, the defendant paid the witness two hundred dollars in cash at "the store"—Publishers Outlet on 42nd Street and 8th Avenue (R. 412, 413).

In the fall of 1958, the witness wrote Exhibit 25 (Exhibit 59 is a second copy) for the defendant at his request (R. 413, 414, 415). Concerning this book, Mishkin "wanted

an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong" (R. 414).

In writing these books, the witness utilized books given her by the defendant (R. 417).

Finally, the witness noted that, when she wrote books for the defendant, she used the name "Shaw Lee" (R. 415).

**Kenneth Johnson,** a writer for ten years, testified that he had known Mishkin since April of 1955 (R. 425-6).

The witness stated that he had written Exhibits 1, 2, 3, 5, 21 (Exhibit 57 is a second copy), 22 (Exhibit 58 is a second copy), 23, 27, 28, 29, 30, 32, 33, 34, 39 (Exhibit 67 is a second copy), 43, 44, 60, 69, 70, 71, and 72 for the defendant at his request (R. 427-449). Further, the witness gave the dates when he wrote the various books an dthe price paid by Mishkin in cash for each one (*ibid.*).

Johnson wrote some of the books for the defendant under the name "Justin Kent," but he used the name "Stan Reeves" at least once (R. 428, 429, 432, 439, 443). And, the defendant paid him for the books either at the Main Stem Book Store (R. 427, 435, 438, 441, 444) or at the store at 254 West 42nd Street (R. 427, 433, 437, 439, 448).

When the defendant asked the witness to write Exhibit 3, Mishkin advised Johnson that "[h]e wanted the female to be the dominant person in the story" (R. 433).

Relative to Exhibit 5 Mishkin gave the witness "an unbound book that he wanted me to extend * * * He wanted me to deal graphically with the implementation [*sic*] of wheels [*sic*, probably "weals"] on a female's body, of the darkening of flesh under flagellation; and he said that the people who read these kinds of books didn't care particularly about sex. He wanted me to concentrate mostly on the changing of the color of flesh when people were being flagellated, and he didn't wan tany blood in it" (R. 434).

Concerning Exhibit 22 (Exhibit 58 is a second copy), Mishkin "wanted * * * [it] to have a strong lesbian theme * * *" (R. 436).

As to Exhibit 43, Mishkin "told me practically the same thing that he had told me about the other books that he wanted on flagellation, not too much sex, that the people were more—the people who buy this book were more interested in the reddening of flesh and in no blood being let because he wanted not too much violence and in—in wheels [*sic*] appearing on the bodies of the victims because this is what the people who bought these books wanted" (R. 446).

On cross-examination the witness identified Exhibit A, produced by defense counsel, as a research paper on pornography written by him for the defendant (R. 463-66, 476).

**Ernest Stanton,** an artist, testified that he had known Mishkin since 1955 or 1956 (R. 477-8). The witness advised that he had executed Exhibits 1A through L, 21A, 23A and B, 25A and B, 30A, 37A and 71A—all drawings—

for the defendant at the latter's request (R. 478-82). Prior to executing the drawings, the witness could recall examining only one manuscript (Exh. 1) in connection with one set of drawings (Exh. 1A-L); he had been made aware by Mishkin that all the drawings were to be used to illustrate books or covers (R. 476-9, 482).

Stanton also drew the pictures which were reproduced in Exhibits 2, 3, 5, 27 and 69 (R. 487-9).

In further testimony, Stanton gave the times when he made the drawings and the price paid in cash by the defendant for each drawing (R. 478-89). These transactions took place, according to the witness, at Publishers Outlet, 254 West 42nd Street (*ibid.*).

**Gene Bilbrew,** an artist, testified that he had known the defendant since 1954 or 1955; that he had drawn for Mishkin at his request, Exhibits 4-A, 24-A, 26-A, 28-A, 29-A, 60-A, 70-A, and 72-A (all drawings), and that he had made the drawings appearing on Exhibits 22, 35, 36, and 70 (R. 530-537). The witness also stated in detail the dates when he executed the drawings and the amounts paid him in cash by the defendant for them (*ibid.*). The witness was paid by Mishkin, in all but one instance, "at the book store"—Publishers Outlet (R. 531, 533, 534, 535, 535, 536, 536, 537). Once, the defendant paid him at the Main Stem Book Store, 49th Street and Broadway (R. 535).

***Production and Distribution of the Books***

**Norman Levenberg**, a photo offset printer, testified that he had known the defendant for approximately twelve years, that he had done printing for the defendant, and that all but three of the books (Exhs. 31-33)—Exhibits 1 through 72—had been printed by him for Mishkin (R. 173-5).

At the time of his testimony [October 24, 1960 (R. 124)], the witness' place of business was at 125 West 21st Street (R. 176). From September, 1957, to May, 1959, his business was located at 37 West 20th Street, and from May, 1959 to January, 1960, it had been at 250 West 49th Street (R. 176-178). Sometime thereafter Levenberg moved to the 21st Street address (*ibid.*). At various times, the witness did business under the names "Norman Offset" and "Marsee Offset" (R. 176).

In connection, Levenberg noted "when I printed up these books I was at 37 West 20th Street; a few of these books, I was at 250 West 49th Street" (R. 176).

The arrangements, according to the witness, relative to his printing the books for Mishkin at the latter's request were the same in each instance (R. 178). The defendant would call the witness and ask him "to come down to his store, that he had a job he wanted me to do" (R. 178-9). Usually, the store in each instance was Publishers Outlet, 254 West 42nd Street, which Mishkin referred to as "my store" (R. 179).

Answering the defendant's call, Levenberg went to the defendant's store and there received from Mishkin "ei-

ther a manuscript or * * * a previously printed book" (R. 179). In the instance of a typewritten manuscript, the witness gave it to a typesetter—either Dorothy Yeeto of Cold Type or Virginia Admerl of Academy Typing Service —who set the type up "in the same size pages that I was going to print it in" (R. 179, 253). When Levenberg received the material back from the typesetter, he photographed the material, then he stripped up "the negatives into book form, print them on the press on flat sheets; and then I would give it to a binder [—either York Bindery or Hudson Bindery—] who would make it up into a book" (R. 180, 253). When Mishkin gave Levenberg an already printed book, the witness "didn't have to bother with the typesetter. All I would do is pull the book apart and photograph it and go through the same procedure" (R. 180).

Further, if the matter to be printed were a manuscript, Mishkin would state the price to be placed on the cover and would also "give me a picture for the cover" (R. 180, 182-3). If the manuscript were "thin," the witness, following the defendant's instructions, would utilize certain techniques to make the finished product "a little thicker" (R. 180-1).

In addition, Mishkin instructed the witness to put a publisher's name and address on the book because "It's got to have a publisher's name on there" (R. 181). At no time, however, did Mishkin ever instruct the witness to indicate the publisher as the defendant or as Publishers Outlet (R. 182). Nor did the defendant ever direct Levenberg to indicate the publisher as any corporation, firm

or name associated with the defendant (R. 182). In fact, Mishkin instructed the witness to "[m]ake up any name and address" (R. 181).

Upon completion of the printing, Levenberg—during the period March 9th, 1958 to March 9th, 1960—took some of the books "to what store he [the defendant] was in at the time"; in fact, he took fifty copies to Publishers Outlet and a like number to the Midget Book Shop (R. 182, 344). The balance of the books were placed in a "warehouse" (R. 182).

The defendant "almost always" paid the printer in cash either in "the store" or in the bar next to the store (R. 192). The price paid by the defendant for each book was usually forty cents—although, if it were a "thin" one, the price was fifteen or twenty cents (R. 192, 193). The number of books ordered by Mishkin varied from a thousand copies to five thousand (R. 192-3). For a printing job, the witness at times got paid a thousand dollars in cash by the defendant (R. 193).

Levenberg also stated that, at times, he shipped—pursuant to the defendant's orders—some of the books to cities out of the state (R. 254).

The first warehouse utilized for storing the books printed by the witness for Mishkin was in the basement of 44 West 17th Street (R. 182). In the middle of 1958, Levenberg moved the books to Room 908 of 37 West 20th Street—the building where he had his shop at the time—because the storage facilities at 17th Street "had rodents in it" (R. 184-5, 187). In November, 1959, the

witness moved the books from Room 908 of 37 West 20th Street to the basement of the building (R. 187).

In connection with the moving of November, 1959, Levenberg declared that the defendant had told him about that time to "Stay away from the warehouse * * * [b]ecause the place was under surveillance" (R. 187-8). For a couple of weeks thereafter, the witness kept away from Room 908 (R. 188). But fearful because he "had his name on the lease," Levenberg then moved the books into the basement of the building the "first chance" he had (R. 188).

Concerning the maintenance of the "warehouse," the witness explained that, at first, the defendant had a man take care of it (R. 188). In that period, the witness merely moved the books printed by him from the binder to the storage area and got paid (R. 188). In March, 1959, however, the defendant fired the man who had been taking care of the "warehouse" (R. 188-9). At this point, Mishkin convinced Levenberg to take over the job which entailed filling orders for the books and gave the witness one hundred dollars a month in cash to pay the rent (R. 185, 189). More specifically, during this time, Mishkin had the witness come "to the store, and he would give me a slip of paper with the books written down on it" (R. 189). The witness then went to the "warehouse," removed the books requested by the defendant and brought them "back to his store" (R. 189).

Usually—"nine out of ten times"—the store to which Levenberg brought the requisitioned books was Publishers Outlet (R. 189). Sometimes, however, after March, 1959, the witness delivered books requisitioned by the defend-

ant to the Main Stem Book Store, Broadway and 49th Street (R. 189-90).

The Main Stem Book Store, according to the witness, was opened by the defendant "around the beginning of '59" (R. 190). The defendant referred to the store "as his store" (R. 191). In fact, Mishkin "was there when they opened it up. He was there. He was giving everybody directions how to knock up the shelves, where to put the shelves, where to put the books" (R. 191).

At this point in his testimony, Levenberg—reiterating that he had printed Exhibits 1-30 inclusive and 34-72 inclusive for the defendant—testified in great detail as to the numbers and dates of each title printed by him (R. 193-253). The witness also indicated that, in those instances where a publisher was listed on the books, such statements were fictitious (*ibid.*).

Levenberg further testified that the drawings—Exhibits 1A-L, 4A, 21A, 23A-B, 26A, 28A, 29A, 30A, 34A, 37A, 60A, 70A, 71A, and 72A—were given to him by the defendant for reproduction in Exhibits 1, 4, 21, 23, 26, 28, 29, 30, 34, 37, 60, 70, 71, and 72 respectively (R. 254-272). These drawings, the witness indicated, had been given by him to his attorney Louis Field with instructions to hand them over to the police (R. 256-7, 272-3).

Testifying in another vein, the witness explained that, when Mishkin wanted certain books moved from the warehouse to Publishers Outlet, the defendant, in the event the order was a large one, wrote the desired titles and numbers thereof on a sheet of paper (R. 273-4). Exhibits

73A, B and C—three slips of paper given by the witness to his attorney to hand over to the police—were orders for books written by the defendant in October 1959, and given by Mishkin personally to the witness (R. 273, 274-6). Listed on the slips of paper (Exhs. 73A, B and C) were the names of books contained in the warehouse including twenty of the titles in evidence (R. 277-80).

The orders contained in the slips, however, were never filled by the witness (R. 274). Having received the orders from the defendant, Levenberg took the slips home with the intention of getting the books the next morning (R. 274). That night, Mishkin telephoned the witness and, cautioning the witness not to fill the order, instructed the witness to come to Publishers Outlet the next morning (R. 274-5). At the store, the next morning, Mishkin told the witness he "couldn't go near the warehouse any more because * * * it was hot" (R. 275).

About a week or two later, Mishkin advised the witness to "get rid of everything I had up in my shop" because "[t]he cops might come up there and search" (R. 275-6). Accordingly, Levenberg destroyed "everything I had in the shop" including negatives, plates and manuscripts (R. 276).

At the same time, however, Levenberg's attorney, with the witness' knowledge and consent, was conferring with the police (R. 304). Although "the police never threatened me. It is a funny thing; they never threatened me" (R. 305), Levenberg, after discussing the matter with his lawyer, "decided to give the police the warehouse" (R. 302).

And later that day he went to the basement to receive the police who had come to pick up the books (R. 304).

Finally, the witness explained that he had not destroyed the drawings because he liked them (R. 276). He did not destroy the three slips of paper because he had left them in a drawer at home and he had forgotten about them (R. 275, 276).

On cross-examination, Levenberg denied that he had told Mishkin that "for so much money I'll take you off the hook" (R. 293). In addition, he denied that he had made such a statement to Adler, Harry Goldman or one "Roundee" (R. 293-4, 310-11). In short, the witness denied "shaking down" the defendant (R. 310).

**Paul Hayman**, an offset and letter-press printer, testified that he had known the defendant for eight years (R. 373). Three hundred copies of Exhibits 31 and 32 had been printed by the witness for Mishkin at the latter's request in March 1959 (R. 373-7). Upon completion of the printing, both books were delivered by the witness to the defendant at "his place of business," Publishers Outlet on 42nd Street (R. 376, 377-8). For printing each title, Mishkin paid the witness forty cents a copy in cash at the Publishers Outlet (R. 375, 376). In both cases, the defendant did not give the witness a manuscript to print from but gave him plates (R. 376).

Concerning the legend "Andiron Press" appearing on the cover of Exhibit 32, the witness stated that, to his knowledge, Mishkin did not have a firm by that name (R. 379). Moreover, the witness' business was not known by

that name and he had never operated under such name (R. 379).

When shown Exhibit 33, the witness declared the book looked like a copy of something he "did quite some time ago" but he was not certain he had printed that particular exhibit (R. 379).

**Dorothy Yeeto** testified that she operated a typing service under the name Cold Type Composition Service, and that she had typed manuscripts for Norman Levenberg when the latter was using the name Automatic Offset (R. 578-9).

The witness identified Exhibits 82 through 90 as her file copies of bills for book manuscripts she had typed for Levenberg relative to Exhibits 25, 4, 21, 29, 72, 23, 71, 2, 5, and 34 respectively (R. 579-592).

**Oscar Shaller**, a bookbinder, testified that he had bound books for Norman Levenberg under an account named "Automatic Offset," 37 West 20th Street (R. 598).

Defense counsel stipulated that the witness had bound for Levenberg the following books: Exhibits 4, 5, 9, 10, 11, 24, 27, 38, 40, 41, 43, 66, 71, and 72 (R. 600-606).

It was further stipulated that, if Lawrence De Nino, a binder of York Bindery were called, he would testify that he bound the following books for Norman Levenberg: Exhibits 3, 14 through 20, and 46 through 56 (R. 609-11).

***Corroboration***

Detective **James Hartigan** of the First Deputy Commissioner's Office of the New York City Police Department testified that, while on active police duty on December 29, 1959, he removed a payroll book (Exh. 76) and a manila envelope (Exh. 77) from the Publishers Outlet Book Store, 254 West 42nd Street (R. 490-1). The envelope contained papers including Exhibits 77A through F inclusive (R. 491, 494, 509-10).

**Marilyn Barasch** testified that she had been employed for two and a half years as a bookkeeper for Book Sales, Incorporated, 352 Fourth Avenue—a wholesale book distributor and publisher (R. 492). Her duties, the witness advised, consisted in bookkeeping and supervising the office (R. 492). More specifically, part of her duties entailed processing invoices relative to her firm's book purchases (R. 492-3).

The witness identified Exhibits 77A through E inclusive as original invoices prepared by her firm in the regular course of business relative to sales of books made by her firm and mailed to the seller named in the documents (R. 494-502). Exhibits 78A through E inclusive, the witness identified, as carbon copies from her firm's files of the original invoices (R. 502-7).

The invoices and the carbon copies reflected sales of listed titles of books by Book Sales to Publishers Outlet, 254 West 42nd Street during October, 1958 (Exhs. 77A-E, 78A-E). The original invoices (Exhs. 77A-E) also bore the handwritten notations "OK" in ink.

The witness then identified Exhibit 77F as the bottom half of a monthly statement which had been sent in the regular course of business by her firm to one of its customers (R. 510-13). The witness stated that the monthly statement had been sent to Publishers Outlet because of her written notation "Publishers Outlet" which she placed therein after Publishers Outlet mailed it back (R. 513-16). When advised that the document had been taken from the files of Publishers Outlet and not that of her firm, she could not explain how the document had gotten out of her possession after it had been returned by Publishers Outlet (R. 516).

At this point, the witness testified that her firm also purchased books and that, in the event it later returned some of them, the firm prepared and sent, in the regular course of business, a debit memo to the seller (R. 517-8). The witness then identified Exhibits 79 and 80 as copies from the firm's files of debit memos relating to books returned to the defendant in October and December 1958 (R. 518-22). On one document the defendant's name was indicated as Eddie Mishkin (Exh. 79), on the other as Edward Mishkin (Exh. 80). Included in the list of books returned by Book Publishers to the defendant are several of the titles in evidence (Exhs. 79-80).

The witness further stated that she knew the defendant, and had seen him several times in Book Sales, her place of business (R. 522).

Finally, the witness testified that, when her firm sent out debit memos, entries thereof were made in the accounts

payable ledger books of the firm (R. 524). Exhibit 81 was her firm's accounts payable ledger sheet for the period of August, 1957 to December 1958—for the account of Edward Mishkin (R. 524-6). The witness further testified that the ledger sheet (Exh. 81) reflected the debit memos (Exhs. 79 and 80) which had been sent out (R. 526).

**Alfred H. Schaeffer,** an attorney, testified that he was treasurer of the Metropolitan Title Guarantee Company which among other things services mortgage extensions for the Staten Island Savings Bank (R. 593-4). The witness identified Exhibit 91 as a mortgage extension he had negotiated between the bank and the defendant whom the witness knew (R. 594-6).

At this point, defense counsel stipulated that the signature "Edward Mishkin" appearing on Exhibit 91 was placed thereon by the defendant (R. 594-6).

Again, at this point in the trial, Exhibit 93 was received in evidence (R. 611-13). That document was a certified copy of the certificate of incorporation of Main Stem Books, Inc., and dated September 11, 1958. It listed one Edward Mishkin as a director and stockholder in the corporation.

**Robert S. Tyson** testified that he was an attorney associated with the law firm of Sincerbeaux & Shrewsbury, 55 Liberty Street, that he was secretary of, and his firm the attorneys for, the 1603 Broadway Corporation owning real estate at 1603 and 1607 Broadway, and that one of the stores therein was leased to Main Stem Books (R. 613-14).

The witness recalled seeing the defendant on one occasion in September, 1958 (R. 614). At that time, Tyson attended a conference relative to the prospective leasing of the store known as 1607 Broadway by the defendant and his associate Schenkman (R. 614). Present at that conference were the witness, Mishkin, Schenkman, the defendant's attorney, and the building manager (R. 614, 621).

The leasing of the store, however, was not consummated that day, but was later entered into between the witness' corporation and Main Stem Books (R. 615).

Tyson identified Exhibit 94 as the executed lease with his signature thereon (R. 615). Also present on the lease for Main Stem Books, Inc. was the signature "Edward Mishkin Pres" (Exh. 94). The lease was to commence October 31, 1958, but the term thereof was not indicated (Exh. 94).

After the witness signed the lease, he delivered it to his associate John F. Lydon for signature by the other party (R. 616). The witness did not see the defendant sign the lease (R. 615, 616).

Early in 1960, Tyson negotiated an assignment of the lease (R. 617). However, between October 1958 and early 1960, Main Stem was the only lessee of the property in question (R. 617).

At this point, the witness identified Exhibit 95 as a letter, dated February 18, 1960, directed to Phil's Book Shop Inc., 1607 Broadway, prepared and signed by him consenting to the assignment of the lease from Main Stem to Phil's Book Shop (R. 618).

**John F. Lydon** testified that he was an attorney associated with the firm of Sincerbeaux & Shrewsbury (R. 624-5).

The witness recalled entering into negotiations relative to the leasing of the store at 1603 Broadway in September, 1958 (R. 625). Present at the conference were the witness, the defendant, Schenkman, a Mr. Ringle and another attorney (R. 625, 626, 629). The conversation took place both in the "executive offices" of the building and in the vacant store at 1607 Broadway (R. 625). All persons present discussed the leasing of the store and whether the lease could be executed prior to the formation of the corporation which was going to lease the store (R. 626-7). Lydon, however, could not recall which person said what (R. 527).

Referring to the executed lease of the premises (Exh. 94), the witness could not recall whether it had been left with him for execution nor whether he was present when the defendant signed it (R. 632).

At this point, it was stipulated that the defendant had executed the lease for Main Stem Books (Exh. 94) in September 1958, and that four or five months thereafter the defendant divested himself "on paper" of stock in that corporation and ceased to be an "officer of record" (R. 633, 635).

It was stipulated that, if Lieutenant **Richard Dimler** of the First Deputy Police Commissioner's Office were called, he would testify that, on March 9th, 1960, the defendant wrote all the handprinted and handwritten nota-

tions on Exhibit 97—an arraignment card in the 5th Precinct Police Station (R. 639).

It was also stipulated that Lieutenant **Joseph McNally** of the Police Laboratory of the New York City Police Department was an expert on questioned documents (R. 637, 641). It was further stipulated that if Lieutenant McNally were called, he would testify that he had compared the defendant's admitted signatures on Exhibits 91 (the mortgage extension agreement) and 97 (the arraignment card) with the writings on Exhibits 73 A, B and C (written orders given by the defendant to the printer Levenberg), and that the writing on Exhibits 73 A, B and C was executed by the defendant (R. 639-40). Comparison of the handwriting on Exhibits 91 and 97 with Exhibit 74 [contract between the defendant and the writer Rosen (Roskolenko)] established that the signature "Edward Mishkin" on Exhibit 74 had been written by the defendant (R. 640). Again comparison of the defendant's admitted writing and printing on Exhibit 97 with the written word "OK" on Exhibits 77A through E (Book Sales' invoices of sales to Publishers Outlet and taken from Publishers Outlet) and the notation "OK Ed" on Exhibit 77F (Book Sales' monthly statement taken from Publishers Outlet) demonstrated that the aforementioned statements on Exhibits 77A through F were written by the defendant (R. 640-1).

**Bernard Abrams** testified that he had been the accountant for the Publishers Outlet Store since it started business in 1957, and that he handled the payroll for that store (R. 644-5).

During the period April, 1958 through December, 1959, the witness recalled seeing the defendant twice in the store (R. 648). On those occasions, Mishkin was "watching customers" (R. 648).

The witness insisted that Harvey Revo was president of the corporation and the defendant an employee despite the fact that a payroll book for the store for the period January 1957 to December 1958 (Exhibit 76) reflected both the defendant and Revo as employees. Further, for the period January 1957 to August 1958, the defendant's salary was $175.00 per week and Revo's $100.00 per week (R. 645-52).

**Abraham Lieberman** testified that he had been president of Book Sales for seven years, and that his firm bought and sold books "all over the country" (R. 545-6). The witness had known the defendant for eight or nine years and had done business with him (R. 546). Upon examination of two of his firm's debit memos (Exhs. 79 and 80), the witness recalled that he had done business with the defendant in the years 1958 to 1960 (R. 546-7). The witness, during that period, conversed with Mishkin not only in the witness' office but also in the book store, Publishers Outlet (R. 547-8). Also, when the witness desired to get in touch with the defendant, the witness telephoned Publishers Outlet (R. 548).

**Peter C. Vaccarella** testified that he was the owner of a bookstore bearing his name in a subway arcade, 205 West 42nd Street (R. 557-8). During the period December of 1957 to March 1, 1958—when the witness opened his own

store—he and the defendant together operated a bookstore under the name Telephoto Publishing Corporation at 218 West 47th Street (R. 558, 564).

After Vaccarella had opened his own business, he purchased books from the defendant personally for resale (R. 558-9). The witness paid the defendant in cash at the rate of a dollar or two per book and resold each at four or five dollars (R. 562-3). In connection with the purchase of the books, Vaccarella always saw Mishkin in Publishers Outlet on 42nd Street and had occasion to see the defendant there on an average of once a month from March of 1958 to four or five months prior to the trial [October, 1960 (R. 124)] (R. 558-9, 560-1).

The witness further testified that he had purchased from Mishkin for resale copies of Exhibits 4, 23, 24, 26, 28, 37, 38, and 40 (R. 559-60).

Concerning Publishers Outlet, the witness testified that he had the impression that the defendant was part owner of it, and, in fact, it was his recollection that Mishkin had once so advised him (R. 561-2, 568-78).

**Jay Dreyer** testified that he was a salesman for Berkley Publishing Company, 101 Fifth Avenue, that he knew the defendant, and that he had done business with Publishers Outlet Store from September to December 1957 and from May to July 1957 (R. 653). During the latter period, he visited the store twice a month and he saw Mishkin there at least once a month (R. 654).

On these occasions, the defendant stood at "the side of the shop" and "I might nod to him, he might nod to me"

(R. 655). The witness, however, dealt with other men in the store (R. 655).

On one occasion, after a conversation with a clerk, Dreyer brought "his" covers and "I gave them to Mr. Mishkin and he sort of rifled through them rapidly and he handed them back to me without comment and then I went back to try and sell to * * * [a] clerk or the men in the store" (R. 656).

On another occasion, the defendant "nodded his head to a clerk on the floor toward a customer who was near some books that were in cellophane wrappings and the clerk then went over and asked the man if he could help him with the purchasing of the books" (R. 657).

Again, Dreyer noted that "clerks in the store would approach Mr. Mishkin and talk to him and whisper to him and he would listen, cock his ear and then he would turn, he would pick his head up and they would walk away" (R. 658-9).

Further, the witness declared that he had never sold the defendant any of the books contained in Exhibits 1 through 72; that, in fact, he had never sold them to anyone; and that his company had nothing to do with those books (R. 658-9).

Finally, the witness noted that he had never seen the defendant sell a book or wait on a customer (R. 662).

**The Defense**

**William Walsh,** a salesman, testified, when asked if he had been convicted of a crime, that he had been convicted "Just in the store there, with the books" (R. 642).

The witness further testified that he had been employed as a salesman by Mr. Martin Kleinberg of Kingsley Book Store, 220 West 42nd Street (R. 643). On about eight or ten times Norman Levenberg of Norman Offset Company delivered packages of books to the store (R. 643). Levenberg gave the witness an invoice for the books, and the witness told him, "That will be taken care of" (R. 643).

The witness never saw his employer Kleinberg pay Levenberg by check for the books (R. 643). In fact, the witness did not know whether Levenberg was selling merchandise on his own account or for someone else (R. 643-4).

**Frank Adler,** a former bookstore owner, testified that he had been convicted of possessing obscene books and of petit larceny (R. 664-5, 672-3).

About a month and a half prior to the trial, the witness testified, he, Levenberg and Goldman—also known as Roundee—had a conversation on 42nd Street near 8th Avenue (R. 665). Goldman introduced Levenberg to the witness, stating that Levenberg "wants to get Mishkin" (R. 666). Levenberg then asked the witness to tell the defendant that he [Levenberg] would leave town or not testify or change his testimony if the defendant gave him money (R. 666). The witness agreed to give the message to Mishkin, and later spoke to him (R. 666).

## Summary of Argument

According to sound and venerable interpretation, our Constitution bestows no freedom to distribute pornography. On fair appraisal, there is little question that the fifty-two exhibits in the present case earn no protection. Concededly undistinguished by literary, artistic, or intellectual interest, their primary feature is a blatant appeal to prurience in a manner patently offensive to community standards. In this regard appellant's simple claim, that the books with predominantly sado-masochistic themes are repulsive rather than stimulating to the average man, does not allow him to escape the character of his creations. For, logically, the average man is not the proper audience by which to measure material appealing primarily to the abnormal. Rather those whom the publications are likely to reach are the proper referents, and this conclusion, supported by numerous cases and commentaries, is not foreclosed by appellant's misinterpretation of *Roth*.

Furthermore, the existence of a group specially susceptible to sado-masochistic material, as well as the nature of their tastes, are attested to by psychiatric literature, the logic of the market economy, and the instructions of Mishkin to his writers and artists, the defendant outlining in detail just what the books should contain and why. Indeed, Mishkin's purposeful pandering to prurience is firm evidence of the pornographic nature of his product.

Books of a sadistic and masochistic nature are not, as appellant argues, free from control. Nor do these statutory terms have any meaning apart from the word "ob-

scene." The words "sadistic" and "masochistic" in the New York statute simply describe a particular form of obscenity, but obscenity nonetheless. Certainly books of this type fall well within the constitutional definition of the term "obscene." Further, the legislative history of the statute as well as the opinion of the New York courts have construed the words "sadistic" and "masochistic" to be synonymous with the word "obscene."

Nor is the word "obscene" vague in a constitutional sense, rulings of this Court foreclosing appellant's well-worn argument.

Furthermore, scienter was overwhelmingly established by a variety of evidence introduced at the trial. Mishkin, as publisher, directed what the books were to contain, and told writers and artists that they should concentrate on highly sexualized representations, especially sexual aberrations. Moreover, the covers, contents, selling price, and falsification of his publishing activities all combine to prove conclusively that Mishkin had the required mental element of scienter. Appellant's claim that scienter requires the defendant to make a constitutional judgment that the book is obscene goes far beyond limits of reason and authority.

Finally, the searches and seizures conducted in the present case were all lawful. The majority of the publications were seized pursuant to the voluntary consent of an accomplice who was in charge of the warehouse where the books were stored. Further, a search warrant was obtained in addition to the consent of the custodian, and the defendant did not properly challenge the sufficiency of the warrant

at the trial. Other publications were seized incident to arrests at bookstores open to the public. As contraband they were properly subject to seizure, and appellant's contrary arguments based on decisions involving prior restraints in civil proceedings, are inapplicable to the procedures of criminal prosecution. Moreover, one book which Mishkin published, was sold to a policeman in a bookstore, the sale giving him clear title and obviating any issue of search and seizure.

## POINT I

**The materials underlying the conviction enjoy no constitutional protection, for they are obscene according to the appropriate standards, judges, and audiences for measuring that concept.**

The intellectual and artistic ideals of this Nation, fundamental to our concepts of a civilized society, place the realms of the expression beyond the reach of government. Among those necessary curtailments of absolute personal freedom, speech enjoys a high immunity. Yet not every verbal or pictorial utterance is protected speech, for the value of the shield is affected by the nature of the utterance and the damage it inflicts. Disorderly, panic-producing, libelous, fraudulent, and imminently riotous declarations are traditionally reserved for governmental suppression. Similarly, history and near-universal usage exempts the dissemination of obscenity from Constitutional protection.

At an earlier time obscenity was considered a matter "punishable only in the Spiritual Court" [*Regina* v. *Reed*,

Fortescue 98, 92 Eng. Rep. 777 (1708)]. The English courts, however, a short while later came to regard obscenity as offensive to the common law [*Rex* v. *Curl*, 2 Strange 788, 93 Eng. Rep. 849 (K. B. 1727)], and this view was received into American jurisprudence [*Commonwealth* v. *Sharpless*, 2 S & R 91 (Pa. Sup. Ct. 1815); *Commonwealth* v. *Holmes*, 17 Mass. 336 (1821)]. But it was not until the Victorian era that a definition or legal test of obscenity was fashioned in *Regina* v. *Hicklin* [L.R. 3 Q.B. 360 (1868)].

Unfortunately, however, the *Hicklin* test—"whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"—could operate to ban anything from Boccaccio's *Decameron* [*Commonwealth* v. *McCance*, 164 Mass. 162, 41 N. E. 133 (1895)] to Dreiser's *An American Tragedy* [*Commonwealth* v. *Friede*, 271 Mass. 318, 171 N. E. 472 (1930)]. And the reign of the *Hicklin* rule further enhanced the climate and opportunity for censorship by allowing the self-appointed "crusaders," inflamed by any sexual representation, to scorch by their own passions valued works of social and artistic expression. But while the misguided excesses of such people are difficult to quell, their weapon, the *Hicklin* rule, was blunted by the enlightened decision of Judge Wolsey in *United States* v. *One Book Called "Ulysses"* [5 F. Supp. 182 (S. D. N. Y. 1933), *aff'd* 72 F. 2d 705 (2d Cir. 1934)], and finally broken by this Court in *Roth* v. *United States* and *Alberts* v. *California* [354 U. S. 476 (1957)].

The outstanding impact of *Roth*, of course, was the final abolition of the pernicious practices of reviewing selected passages, isolated from the work as a whole, and judging their effects by the minds of children. Instead, reaffirming that "obscenity is not within the area of constitutionally protected speech or press" [354 U. S. at 485], the Court required reference to the "dominant theme" of the entire piece questioned, and created the renowned phrase "appeal to prurient interest" to characterize the obscene [*id.* at 489]. Moreover, implicit in the exclusion of obscenity from the protection of the constitution is that the material must be "utterly without redeeming social importance" [*id.* at 484]. An additional test was later enunciated by this Court in *Manual Enterprises, Inc.* v. *Day* [370 U. S. 478 (1962)] where it was held that material must also be "patently offensive" in that it goes substantially beyond customary limits of candor in representing sexual matters [*id.* pp. 482-6]. And these standards, despite much criticism, were all recently reaffirmed by this Court in *Jacobellis* v. *Ohio* [378 U. S. 184, 191-2 (1964)].

Perhaps the confusion engendered by *Roth* is due in some measure to the eliptical phrasing of the test so it appears to express a single standard. The language of the critical formulation of *Roth* was:

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." [354 U. S. at p. 489.]

Unfortunately, the test, compressed into one brief sentence, tends to elide two quite different measurements. The amal-

gam, as commonly read, calls upon the average man, with his appreciation of general standards of decency, to measure by his own libido the special appeal to prurience of certain, often bizarre, materials. Since current social values have only the most trivial relation to the private erotic itch the Court could not have intended so illogical a test at the nexus of this far-reaching problem. Rather "community standards" heralds the test of "patent offensiveness" made explicit in *Manual Enterprises,* for the customary limits of candor correctly refers to the contemporary sensitivity of the community at large. Moreover, the "average man" who heads the *Roth* construct can only be considered a judge of offensiveness to community standards, and neither of redeeming social value nor of prurient appeal. Certainly the findings of a jury are not conclusive or even presumptive of the social value of a work [*Jacobellis* v. *Ohio,* 378 U. S. 184, *supra*], and indeed it would be dangereous to entrust the average man with this decision. For, realistically, the sometimes subtle aesthetic merits of a work may be beyond his understanding and intellectual values, and should no more be fettered to the tastes of mediocrity than to the appreciation of children. Too, he cannot be the measure of prurient interests, because much of what is clearly and commonly recognized to be pornographic appeals only to the peculiarities of the abnormal viewer. At most, the *Roth* construct says only that "the average man" should judge whether the work "appeals to prurient interests." It does not say that it must appeal to the prurient interests of the average man. Surely, *Roth* did not posit an "average man" who is erotically stimulated by the lowest and most perverse representations of sex and the sexual experience.

A synthesis of judicial opinions discloses not a tangled morass of verbal formuli, but a comprehensive, realistic delineation of the ambit of constitutional protection. There are actually three separate standards upon which the constitutional protection rests, any one of which can support the lawful dissemination of material. And further, each standard must necessarily be judged by a different litmus quite independently of each other. Clearly, redeeming social value must be judged by the courts, perhaps with the aid of experts and critics. No less obviously, patent offensiveness must be judged in terms of contemporary community standards, this being the domain of the average man who is most expressive and understanding of the community's tolerance. Finally, "appeal to prurient interest" must be taken quite literally and alone, and be judged in terms of the reaction of those likely to be reached by the material. Lest this be misunderstood, it should be stated that there is no danger of returning to *Hicklin* by using even the most perverse and susceptible viewer as the referent for this latter characteristic. For even if his prurient interests are aroused by something quite innocent, as may indeed be the case, the material could not be banned unless it is also patently offensive to the average man and lacking utterly in redeeming social value as the courts understand the values of the society.

In the present case, neither appellant nor *amici* claim that the publications have the slightest redeeming literary or social value, and they tacitly admit, as they must, that the exhibits are patently offensive, for indeed these books go well beyond the customary limits of candor in description and depiction of perverse sexual matters. But falling

heir to the common confusion of tests and audiences, the appellant argues that the publications dealing with sado-masochism are exempted by the "prurient interest" test of *Roth*, since presumably the aberrant appeal of such literature would bore or repulse the "average" or "normal" man rather than excite lustful response. His misinterpretation of *Roth*, however, is not at this date foreclosed to argument, since this Court in *Manual Enterprises* was not required, and thus specifically declined to discuss, the audience appropriate to measure "appeal" [370 U. S. at 481-482].

Nevertheless, the compelling combination of what is implicit in *Roth*, other authorities, scholarly opinion, reason, and public policy is persuasive that the prurient appeal of material must be measured by those whom it is likely to reach;* whether in some cases sexual deviants, or in others the average man himself.

* It should be mentioned that certain commentators, both on the bench and off, speak of an audience to whom the material is directed, rather than of those whom it is likely to reach. Since these authorities are nevertheless in agreement that the prurient interests of susceptible groups, not necessarily the average man, are the proper interests to be considered under *Roth*, they are thus pertinent to the question presented. But their manner of locating that susceptible group, through intent of the disseminator, seems less useful than finding it through the character of the material. Actually, "direction" of material to an audience is more properly evidence of what is likely to reach that audience, for direction of marketable material is usually deliberate. Furthermore, direction to a particular audience may be more difficult in terms of proof, involving as it does the intent of the disseminator who may or may not testify at a trial. It also, of course, opens an avenue to subterfuge through the giving of wrong directions. The nature of the material, however, would usually be more plain, and the audience more easily inferable from the contents. And ultimately, since this Court has used only the material to determine obscenity [*Manual Enterprises* v. *Day*, 370 U. S. at pp. 487-8], it would be more consistent to continue confining the inquiry to the character of the work itself.

While the *Roth* test itself gives little hint of the proper audience, the Court upheld, as "sufficiently following the proper standard," the trial court's instructions to the jury to test the effect of the material "upon all those whom it is likely to reach" [354 U. S. at 490]. Although the court continued by advising the jury to "determine its impact upon the average person in the community" [*ibid.*], the Supreme Court endorsement is determinative of the audience in *Roth* only. It necessarily falls short of general application, since the material in *Roth* was the sort "likely to reach" the average person in the community. Thus, because its primary appeal was to the average man's prurient interest [see, Lockhart & McClure, Obscenity, The Developing Constitutional Standard, 45 Minn. L. Rev. 5, (1960)], the average man became the proper referent. Logically, however, the rationale—the effect of the material is to be considered upon all those whom it is likely to reach—compels reference to an audience other than the average man where the material is of a character likely to reach a special audience.

The *Roth* test of obscenity is drawn from the definition proposed in the model penal code of the American Law Institute [A. L. I., Model Penal Code, §207.10 (2) (Tent. Draft No. 6, 1957); *Roth* v. *United States,* 354 U. S. at 487 n. 20, *supra*]. But while *Roth* did not further specify the relevant audience, the model penal code confronts the issue and provides an answer in accord with the foregoing discussion: "Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially

susceptible audience [*id.*]. The new New York Penal Law, effective Sept. 1, 1967, has endorsed and adopted the suggestions of the American Law Institute relating to both the definition and appeal of obscene material [N. Y. (future) Penal Law, §235.00(1)].

Other legal scholars, such as the obscenity experts Lockhart and McClure, have also reasoned that the average man cannot be the litmus for material not likely to reach the average man. Indeed, they find in a contrary conclusion the creation of an impermissible paradox in which a type of material which "is the one class of material now certainly obscene" would be exempt from obscenity prosecution and control [Lockhart & McClure, *op. cit. supra,* 45 Minn. Law Rev. 5, 73 (1960)]. Thus, in favoring the adoption of a "variable obscenity" test, these commentators have underscored as an advantage the unquestioned inclusion of "hard-core" material appealing to deviants [45 Minn. Law. Rev. 5, 77-9, *supra*; also see the same conclusion in Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. Pa. L. Rev. 834, 846 (1964)].

Moreover, cases which have considered material appealing to a special audience, rather than to the general public, have inevitably arrived at the conclusion that the special audience must be the one in whose response prurient interest is measured. The Court of Appeals in *Manual Enterprises* v. *Day* [289 F. 2d 455 (D. C. Cir. 1961), rev'd on other grounds, 370 U. S. 478, *supra*], for instance, found challenged magazines to have been "deliberately published because of their effect upon homosexuals" [*id.* at p. 456]. The court felt that "the real meaning of *Roth* is that the

object in question is not to be considered in terms of the reaction of an isolated atypical consumer" [*ibid.*]. Deciding that the average member of the community would be "an atypical reader of these magazines," the court concluded:

> "The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals" [*ibid.*].

Noteworthy too is the learned decision by Judge Palmieri in *United States* v. *31 Photographs* [156 F. Supp. 50 (S. D. N. Y. 1957)], a case involving the importation of concededly hard-core pornography by scientists of the Institute for Sex Research at Indiana University. The central question there presented was whether material which would appeal to the prurient interests of the average man could also be considered "obscene" when likely to reach only a dispassionate scientific audience. Initially commenting upon the standard to be applied the court stated:

> "While the rule is often stated in terms of the appeal of the material to the 'average person,' Roth v. United States * * * it must be borne in mind that the cases applying the standard in this manner do so in regard to material which is to be distributed to the public at large. *I believe, however, that the more inclusive statement of the definition is that which judges the material by its appeal to 'all those whom it is likely to reach.'* United States v. Levine, 2 Cir. 1936, 83 F. 2d 156, 157. Viewed in this light, the 'average man' test is but a particular application of the rule, often found in the cases only because the cases often deal with material which is distributed to the public at large." [156 F. Supp. at pp. 354-5, emphasis supplied]

Thus the court ruled that the importation of the material by the scientists was permissible, their cold professional

detachment, presumably, being in no danger of being melted by the salacious nature of the material [also see, *United States* v. *One Unbound Volume, etc.*, 128 F. Supp. 280 (D. C. Md. 1955); *United States* v. *One Package*, 86 F. Supp. 737 (2d Cir. 1936); *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940); *United States* v. *Smith*, 45 F. 476 (D. C. Wisc. 1891); *United States* v. *Chesman*, 19 F. 497 (E. D. Mo. 1881)].

Returning to the present case, there is no doubt whatever that the sado-masochistic books published by Mishkin were likely to reach primarily those people whose prurient interests are aroused by portrayals, both verbal and pictorial, of these sexual deviations. Since, as the appellant assumes, the average man is not a secret sado-masochist and is therefore not likely to purchase the exhibits in the case, he is obviously the wrong audience by which to measure the prurient appeal of Mishkin's output. However, there is no doubt that there does exist a group peculiarly susceptible to the prurient appeal of sado-masochistic material [see, *e.g.*, Sexual Behavior of the Human Female, Indiana University Institute for Sex Research, pp. 676-81; Caprio, Variations in Sexual Behavior, pp. 206, 265, 271, 273 (1957); New York Legislative Documents, vol. 3 (1956), pp. 60-66]. The Indiana Institute reports, for instance, that:

> "Persons who respond only or primarily to objects which are remote from the sexual partner, or remote from the overt sexual activities with a partner are not rare in the population. This is particularly true of individuals who are erotically aroused by high heels, by boots, by corsets, by tight clothing, by long gloves, by whips or by other objects which suggest sado-masochistic relationships" [*supra*, pp. 678-9].

Obviously too, the observation that such people "are not rare in the population" is implicitly confirmed by the plethora of publications pandering to their tastes which Mishkin produced, for nothing short of a substantial market would have warranted his investment.

While appellant acknowledges that there may well exist "characters and cults" whose prurient interests are stimulated by the material (brief, p. 17), both he and *amicus* argue that the prosecution must independently offer proof of prurient appeal to satisfy constitutional requirements. They rely especially on the recent decision of Judge MOORE in *United States* v. *Klaw* [—— F. 2d —— (decided July 15, 1965), reprinted in appendix B of appellant's brief] which held that the complete absence of evidence in the record concerning the nature of the material's appeal flawed the judgment, the jury being in no position to determine appeal without expert help.

In this regard, *Klaw* goes a good bit further then pronouncements of this Court in related matters. For instance, in *Smith* v. *California* [361 U. S. 147, 164-7 (1959)] Justice FRANKFURTER, concurring, thought it error to refuse to hear proof of community standards when offered, and Justice HARLAN agreed [*id.* pp. 171-2]. But their view was not, as in *Klaw,* that the prosecution had the burden of introducing such proof; rather they stated only that the State "is not privileged to rebuff *all* efforts to enlighten or persuade the trier" [*id.* 172, emphasis in original]. New York, it may be noticed, has ruled only that evidence of other similar publications being offered for sale in the community is not probative of contemporary standards [*People* v. *Finkelstein,* 11 N. Y. 2d 300 (1962)].

But in the context of this case, the questions of whether the burden is on the People to introduce proof of prurient interests, and whether proof of experts must be accepted by the court when offered, are academic. For, although neither side offered independent expert testimony at the trial, the record contains much that could be considered evidence of the prurient appeal of sado-masochistic material. Thus the *Klaw* flaw was, to all intents and purposes, absent.

Both the existence of a specially susceptible audience and the nature of the appeal of sado-masochistic books were evidenced clearly by the instructions given to the writers by the appellant, avowedly something of an expert in the field. Thus, in generating the publication of the book *Her Highness* [Exh. 5], Mishkin told the writer Kenneth Johnson "to deal graphically with the implementation of wheels [*sic*, probably "weals"] on a female's body, of the darkening of flesh under flagellation; and he [Mishkin] said that the people who read these kinds of books didn't care particularly about sex. He wanted me to concentrate mostly on the changing of the color of flesh when people were being flagellated, and he didn't want any blood in it" (R. 434). Similarly, with reference to the writing of *Columns of Agony* [Exh. 43], Mishkin told the same writer "practically the same thing that he had told me about the other books that he wanted on flagellation, not too much sex, that the people were more—the people who buy this book were more interested in the reddening of flesh and in no blood being let because he wanted not too much violence and in—in wheels [*sic*] appearing on the bodies of the victims because that is what the people who bought these books wanted" (R.

446). And for the book *So Firm and So Fully Packed* [Exh. 23] Mishkin told the writer first to "learn about fetishes" (R. 436-7). Further, for the book *Masque* [Exhs. 25 & 59], the writer Leotha Hackshaw was informed by Mishkin that he "wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing" (R. 414).

The results, as a glance at the exhibits will reveal, were in accord with Mishkin's instructions, for the publisher knew his audience, custom-tailored his publications for them, and made his profits from their desire for the material.

Indeed, while perhaps not an integral part of the *Roth* standards, a defendant's deliberate catering to prurient interests has itself been regarded as an important feature in finding obscenity. Thus, concurring in *Roth,* the Chief Justice stated that "the conduct of the defendant is the central issue, not the obscenity of a book or picture" [354 U. S. at 495], and found criminal the conduct of defendants "engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect" [*id.* at 496].*

Accordingly, under such circumstances, it would be completely anomalous to hold these books within the constitutionally protected sphere because their appeal to the aver-

* Other commentators also have advocated an obscenity test based on the conduct of the disseminator alone [Paul & Schwartz, Federal Censorship 216 (1961)]; also see Model Penal Code §251.4, proposed official draft 1962, which designates criminal the dissemination of material "whether or not obscene, by representing or suggesting that it is obscene."

age man is limited. Their content, dominant theme, indeed only theme, and treatment are all patently offensive; aesthetically the books are gross and unattractive; they appeal to prurient interests, and completely lack merit, artistic, literary, or intellectual. In brief, what has been said of pornography in general attaches to this particular form of it. It is no less obscene.

Finally, no challenge is made to the finding of obscenity where the exhibits portray sex in its more "conventional" forms (Exhs. 2, 3, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 60, 69, 70, 71, 72). Indeed, the last exhibit, the book *Queen Bee*, was separately considered by the New York Court of Appeals in *People* v. *Finkelstein* [11 N. Y. 2d 300 (1962), cert. denied 371 U. S. 863 (1962)] where it was found to be "definitely obscene * * * They unquestionably meet the *Roth* test" [*id.* at p. 305]. And, it may be added, the New York high court reviewed this publication in light of an interpretation of *Roth* which withdraws constitutional protection from "hard-core" pornography only [see, *People* v. *Richmond County News*, 9 N. Y. 2d 578 (1961)].

Apparently realizing that his primary claim does not encompass seventeen of the exhibits, the appellant is forced to create a basis for reversal which is all inclusive. Thus he argues that Mishkin was convicted under two theories, one that the books are sadistic and masochistic, and the other, that they are obscene. Concluding an almost *pro forma* point he argues that there is no way of knowing upon which theory any particular book was condemned.

The case cited by appellant for support, *Stromberg* v. *California* [283 U. S. 359 (1931)], is, however, quite in-

apposite. In *Stromberg* the defendant was convicted under a statute proscribing the display of a red flag under three separately enumerated circumstances. Display was prohibited as a symbol of opposition to organized government, or as a stimulus to anarchistic action, or as propaganda of a seditious character. The jury, instructed that the three grounds were disjunctive, nevertheless returned a general verdict of guilty. Thus it was impossible to say which clause was violated, and this Court, finding the first clause unconstitutional, necessarily reversed the conviction, for the verdict may have rested exclusively on that clause.

In the present case, however, the sole theory of the prosecution was that all the books were "obscene," those of the sado-masochistic type being no less so because of their specialized appeal. The trial court also found all the books to be obscene under the statute, whether of the sado-masochistic type or not (R. 724-5). Indeed, the court specifically held that the words sadistic and masochistic were "synonymous with obscene" (R. 722). Thus not disjunctive theories as in *Stromberg* underlay the judgment, but one ground, obscenity, was the sole measure of guilt.

Indeed, even were two theories utilized, appellant's argument must still fail. In *Stromberg* where, as the Court noted, there was no way of telling upon which theory the conviction rested, the evidence apparently supporting each of the subsections. Here, by contrast, it is clear from the contents, character, and nature of each book in the present case which ones are primarily sado-masochistic and which are not. Consequently, the books of a more normal sexual type support the judgment on the grounds of obscenity alone, regardless of the foundation supporting the deviant material.

## POINT II

**"Sadistic" and "masochistic" materials are not inherently distinct from obscenity, nor are those words, or the word "obscene" unconstitutionally vague.**

Handily, the appellant weaves straw into gold, arguing that "sadistic" and "masochistic" writings are constitutionally protected speech. Insofar as Section 1141 of the New York Penal Law covers material of this description, he claims, it goes beyond "obscenity," the limited area of permissible state action. Thus, he concludes, the New York statute as applied is unconstitutional.

The key to appellant's error is a false dissociation between words embraced by the same concept. The concept of obscenity in a constitutional sense comprises material which is patently offensive, appealing primarily to prurience, and devoid of redeeming social or artistic value. Implicit also in the word obscene may be a characteristic sexual, erotic, or libidinous flavor. Regardless of how the terms sadism and masochism may be defined themselves, there can be little doubt that a discernible portion of such material overlaps the boundaries of obscenity, fully satisfying each essential element of the legal definition of the area. To this extent, sadistic and masochistic matter is exempt from constitutional protection. Nor is there the slightest doubt that the material to which the statute was applied in the instant case, though more particularly describable as sado-masochistic, falls well within the more general category of obscenity. It is all clearly of that

sex-linked genus which is patently offensive to the average man applying contemporary standards of candor; it is appealing to the prurient interests of a psychiatrically identifiable group; and no court could find redeeming value in these items, social, artistic, or scientific. It is therefore obscenity.

Section 1141 of our Penal Law suffers, it must be acknowledged, from grievous prolixity. Drafted in the old style, one word is never used where six can be found to say the same thing. The result is not only cumbersome, but prone to construction by the maxim *expressio unius est exclusio alterius*. Where this form of drafting is used, the string of synonyms and subcategories must be complete, else some might be deemed excluded by omission. Thus the necessity for adding "sadistic" and "masochistic" which would otherwise be subsumed within the simple term "obscene."*

The addition of the words "sadistic, masochistic" to the New York statute in 1956, moreover, does not indicate that the law was stretched beyond obscenity. It was the express intent of the framers to relieve some doubts in lower courts as to whether this special form of obscenity was proscribed [Testimony of Stephen Kennedy, N. Y. Legislative Documents, vol. 3 (1956)]. The legislature simply added the words as clarification that such material was

* Judge Moore of the Second Circuit Court of Appeals dealing with the same type of material under a federal statute, which does not employ the words "sadistic" or "masochistic" [18 U. S. C. §1461], did not even consider the possibility that this particular form of obscenity might not be encompassed by the proscription of all obscenity [*United States* v. *Klaw*, —— F. 2d —— (2nd Cir. 1965) (reprinted in appendix to appellant's brief)].

indeed obscene. The whole tenor of the hearings and legislative evaluation and report indicates as much.

Furthermore, the use of the word "or" in the statute is not especially significant, for that word, if it has any importance, simply separates particular forms of obscenity, indicating that any one of the enumerated varieties of obscenity will support a criminal charge under the section. Certainly, if a different substantive crime were intended, one apart from obscenity, it would not have been proscribed by its inclusion in the list of modifiers for the titled crime.

Nor can the appellant establish his claim that he was tried on a theory other than obscenity. The opening remarks of the prosecutor which he cites (brief, p. 8) do not support his present allegation, for the ~~jury~~ Court was simply told that most of the writings were of a special type of obscenity, not something other than obscenity.

Indeed, the trial court below in delivering its opinion, stated that the words "sadistic" and "masochistic" along with the string of adjectives following "obscene" in the statute were "synonymous with 'obscene'" (R. 722), a conclusion reached previously in New York in *People* v. *Brooklyn News Co.* [12 Misc. 2d 768, 771 (Kings Co. 1958)]. This judgment, of course, has been affirmed by the Court of Appeals in *Mishkin,* albeit *sub silentio,* and this interpretation of the New York statute by New York courts is binding [*Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 688 (1959); *General Trust Co.* v. *Blodgett,* 287 U. S. 509, 513 (1932); *Williams* v. *Oklahoma,* 358 U. S. 576 (1959)].

In addition to his attempt to locate "sadistic" and "masochistic" beyond the realms of the obscene, the appellant raises an all too familiar issue, claiming that the terms are vague. Vagueness is a perennial problem haunting obscenity statutes, wont as they are to use numerous adjectives, more perhaps to show the vigor of the suppression than concern for enlightening draftsmanship.

But the statutory use of these words within the context of obscenity is sufficiently definite and precise to identify matter proscribed. Indeed, it is considerably more specific than the term "obscene" standing alone, and that word has repeatedly survived constitutional onslaughts on these grounds [*e.g., Roth* v. *United States,* 354 U. S. 476, *supra; Jacobellis* v. *Ohio,* 378 U. S. 184, *supra*]. "The constitution does not require impossible standards," it being adequate if it "conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice" [*United States* v. *Petrillo,* 332 U. S. 1, 7-8 (1947); *Roth* v. *United States,* 354 U. S. 476, 491, *supra*].

Of course, the words sadistic and masochistic are in common parlance. Usage of these terms, like many others which the law has borrowed for special purposes, is broad and varied. Sadism particularly has strong emotive overtones and is frequently applied to simple brutality to convey the image of leering malice. Similarly, it is today deemed sophisticated to speak of certain passive suffering as masochistic, thus implying a perverse desire of some people to receive and endure pain. But, obviously the multiple service of these words, so popular in our age of the

psychoanalytic mystique, in no degree impairs the clarity and certainty of their special use in the law. We would be compelled to revert to Latin were the common usages of English deemed to blur the particular meaning of statutory language.

"Sadistic" and "masochistic," used in the statute as types of obscenity, are subject to the same threefold constitutional test as "lewd" "filthy" or "disgusting" obscenity. Moreover, as obscenity, the portrayals of violence and torture proscribed by the statute must have some erotic element, albeit perverse. Thus the terms in question are used in an almost classic and quite limited sense. As employed, they patently exclude mere brutality or gory description, the appellant to the contrary notwithstanding. The "bloodletting in Shakespeare" is hardly the stuff of erotic stimulation. It is nothing short of absurd to assert that such incidents could conceivably be the basis of condemnation where the work "as a whole" is of such sublime quality as *King Lear* (see brief, pp. 9-10). Nor would mere description of brutality transgress customary limits of candor, which are extremely wide in this area. In addition, the designation obscene is appropraite only where pain is inflicted or endured in that peculiar, fantastic, highly stylized manner which panders to prurient interest.

Moreover, it is apparent from legislative history that the words sadistic and masochistic were incorporated into the statute in the sense of a sexual perversion, rather than as a broad proscription of ordinary brutality. The intent to utilize the pornographic connotation of the words is clearly evidenced by excerpts of testimony given at the

hearings of the Kefauver Commission and reprinted in the New York Legislative Documents as background to the legislation incorporating the terms. For instance, Dr. Karpman, the Chief Psychiatrist of St. Elizabeth's Hospital in Washington, D. C. was asked whether "these bondage, and spanking and whipping photos are pornographic in nature?" He replied, "Absolutely. They are pornographic in the sense that they stimulate the mind to abnormal sexual practices. What you speak of is what we psychiatrists know as sadism, masochism, fetishism and so on. These are abnormal sexual practices" [N. Y. Legis. Doc., vol. 3 (1956) at p. 60].

Furthermore, the *Winters* case [*Winters* v. *New York*, 333 U. S. 507 (1946)], upon which appellant relies, is quite inapposite to the present appeal. In *Winters* the Court considered a separate subdivision of Section 1141 which banned material "principally made up of criminal news, police reports, or accounts of criminal deeds, or * * * stories of deeds of bloodshed, lust or crime." Noting that the New York Court of Appeals made the statute applicable to such publications "so massed as to become vehicles for inciting violent and depraved crimes against the person * * * not necessarily * * * sexual passions" (*id.* at p. 519), the Court reasoned that "it is the massing as an incitation to crime that becomes the important element" (*id.* at p. 515). And that element was found to be unconstitutionally vague.

Specifically disturbing was the fact that the statute "does not limit punishment to the indecent and obscene, as formerly understood" (*id.* at p. 519). This conclusion was reached by both the New York Court of Appeals and this

Court partly from the fact that the proscription in question was separated in a distinct subdivision from the obscenity provisions of Section 1141, subdivision 1 [*Winters* v. *New York, id.* at p. 515; *People* v. *Winters,* 294 N. Y. 545, 550 (1946)]. Because it is a rule of statutory construction in New York, that the text should be read in conjunction with the general subject matter of the statute [*Matter of Rouss,* 221 N. Y. 81 (1917); *Matter of Kaplan* v. *Peyser,* 273 N. Y. 147 (1937)], the New York court in *Winters* found that the legislature could not have meant to duplicate subdivision 1 which deals with sexual impurity [*People* v. *Eastman,* 188 N. Y. 478 (1907); *People* v. *Winters,* at p. 550; also see, *People* v. *Muller,* 96 N. Y. 408 (1884); *Swearingen* v. *United States,* 161 U. S. 446, 451 (1896)].

The negative implication of this reasoning is clear: where the prohibition appears in the first subdivision of §1141, as it now does, it must be interpreted harmoniously with the topic—sexual debasement. Thus it is clear again that, under the provisions in question, "sadistic" and "masochistic" refer to a type of sexual perversion. Hence the infirmities of the law considered in *Winters,* which floated free of the erotic-obscene mooring, are absent here.

Furthermore, the technical meanings of the terms sadistic and masochistic further distinguish them from the crucial clause in *Winters,* for the Court found that "so massed as to incite to crime" had "no technical or common law meaning" [*Winters* v. *New York,* 333 U. S. at 519, *supra*]. It therefore constituted ineffective notice of a new crime, while the addition of the words sadistic and maso-

chistic in the present case is merely a clarification of an old one.

Undismayed by prior failures, the appellant directs the attack of vagueness against the term "obscene" itself. Necessarily, he ignores the contrary holdings of this Court as useless encumbrances to his crusade. Boldly, he parades the long standing difficulties in arriving at a meaningful verbal definition of standards. But limitations of language, with all that problem implies, does not require total abandonment of the concept. Nor does the superimposition of still another formulation substantially alter the inherent element of flexibility in the notion of obscenity. Some courts, such as the New York Court of Appeals [*People* v. *Richmond County News*, 9 N. Y. 2d 578 (1961)] and several judges, such as Mr. Justice STEWART [*Jacobellis* v. *Ohio*, 378 U. S. at p. 197, *supra*] have adopted the so-called "hard core" standard. But the adoption of this phrase obviously leaves open the question of definition. Many, like Mr. Justice STEWART, frankly acknowledge that resolution of its limits depends, in the final analysis, upon an educated subjective reaction to the particular facts and circumstances of the particular case presented.

Moreover, the "hard-core" standard does not even clarify the limits of obscenity by reducing the scope of the term, assuming logic allows elucidation in this manner. For, while it may be felt that the "hard-core" standard manifests a stricter approach than the tests announced by this Court, experience is otherwise. New York, for example, applying the hard-core test, nonetheless found Henry Miller's *Tropic of Cancer* to be obscene [*People* v. *Fritch*, 13 N. Y. 2d 577 (1964)], while this Court, applying *Roth*

later in the same year, found the same book not obscene [*Grove Press* v. *Gerstein*, 378 U. S. 577 (1964)].

Indeed, the endless exercise of formulation and reformulation of verbal standards, beyond the meaningful workable definition synthesized from the opinions of this Court, is fruitless and frustrating. Thurman Arnold observed with accuracy as well as wit that another revision of the standard would start "the futile and desperate game of definition all over again. As William James, the great psychologist, said: 'Such discussions are tedious—not as hard subjects like physics or mathematics are tedious, but as throwing feathers endlessly hour after hour is tedious' " [brief for respondent-appellant in *Vermont* v. *Verhan News Corp.* at p. 22, quoted in Kalvan, 1 Supreme Court Review of 1960, 44].

## POINT III

**Proscribing dissemination of obscenity is a legitimate objective of legislation.**

A criminal offense occurs, under Section 1141 of the New York Penal Law, when obscene material is transferred, distributed, exhibited, "transmuted," or advertised or possessed for that purpose. The statute therefore reflects the legislative purpose to halt all dissemination of these items, while not interfering with the private possession for personal use. This is a legitimate social objective and within the sphere of proper legislative action.

Appellant, particularly through his *amici*, suggests another approach. He would proscribe only pornography

which is thrust unsought upon the beholder. He would thus allow free traffic in obscenity so long as the individual remains free to choose to avoid exposure. This suggestion, of course, tacitly acknowledges that there exists an identifiable class of material subject to some public restraint. In addition, he is not fully consistent on the nature of unavoidable promulgation. While commercial exhibition of hard-core pornographic motion pictures would presumably be allowed, he would ban "blunt scenes of lovemaking on daytime television" (brief of *amici*, p. 11). Mysteriously, he apparently regards the choice of avoidance greater for the viewer of nighttime television.

Apart from some internal weakness in the exposition, his scheme is not without merit. Certainly a community could, by legislation, ban only pornography forced indiscriminately upon all its members, including the unwilling as well as the willing perceiver. Indeed, some highly sophisticated jurisdictions, such as Denmark, seem to follow this theory.

Yet the merit of the proposal, if it be deemed meritorious, does not detract from the power of a legislative body to adopt a different view. Constitutionally, we are not concerned with the relative virtues of various programs of restraint. If the material affected is obscene, and hence beyond constitutional protection, a state or local community may elect such limitations upon display or distribution which in its judgment accord best with the needs and public sentiments of the majority of its members.

Indeed, good and sufficient reasons exist for what Mr. Justice FRANKFURTER used to call "the felt need of the

community'' to ban all dissemination of pornographic material by employing the common device of minor penal sanctions.

Whether rooted in religious concepts of purity or envigorated by pseudo-psychological notions of health, the universal repugnance to the defilement of the human body and debasement of the human passions, is a powerful fact of social existence. There is, of course, a market for the crude exploitation of degenerate lust, but the fulfillment of this demand serves no worthwhile goal. On the contrary, it is often the proper role of government to starve craven appetites. The Constitution's noble catechism no more sanctions satisfaction of the desire for pornography than it compels distribution of dope to those hungry for its poison.

Denying unhindered access to pornography is justified today not on religious grounds in the sectarian sense, nor on grounds that these materials incite to anti-social behavior. Nor do we rely wholly on the deleterious effects upon the mental health of the consumer. Rather the justification, indeed the demand for such regulation stems from considerations of community health in the larger scope of the term. Difficult to describe, and even harder to prove is the deleterious effect suffered by a community blighted by ready availability of pornography. Even the subjective experience of distaste engendered by an hour's immersion in the exhibits of this case is only the first step in understanding the social sickness produced by free distribution of such material. Yet it takes no fine sensitivity for the citizens of this community to detect neighborhoods

and stores catering to the prurient appetites. The malodorous sites might well spread if the community were deprived of such weapons as they presently have.

It is therefore no exercise in subtlety to speak of the tone of a community, nor is it beyond the province of the criminal law to aid in the improvement of that tone. In an era of rapid growth of urban centers where so many people must make their homes, this intangible quality becomes a vital factor in the health of the community. It is more closely analogous to pollution than politics, to sanitation than sanity. And the weapons of control are beneficial, the sacrifice minimal.

## POINT IV

**The constitutional requirement of scienter was conclusively established by the proof at the trial.**

In *Smith* v. *California* [361 U. S. 147 (1959)] this Court held that a state could not impose absolute criminal liability on a bookseller by eliminating "all mental elements from the crime" [*id.* at p. 155]. Shortly thereafter, the New York Court of Appeals decided that scienter was an element of the crime described by Section 1141 [*People* v. *Finkelstein,* 9 N. Y. 2d 342 (1961)]. But while neither court decided specifically just what sort of mental element was required, it would seem clear that appellant's interpretation—that the defendant must know the material is obscene at law—is both unwarranted and incorrect.

In discussing scienter in *Smith,* the Court initially defined it as "knowledge by appellant of the contents of the book" [*id.* at p. 149], and throughout the majority opinion the word "contents" was used [*id.* at pp. 149, 153, 154]. Concurring opinions, however, use, apparently interchangeably, or in combination, the words "contents," "nature" and "character," and by expanding the significance of these last two terms appellant creates the authority for his claim.

However, in *Rosen* v. *United States* [161 U. S. 29, (1896)] this Court specifically rejected the argument now advanced by appellant. In *Rosen,* a prosecution for sending obscene literature through the mails, the defense requested a trial instruction of acquittal if a reasonable doubt existed that the defendant knew the material to be obscene. In upholding the refusal to charge in this manner the Court, speaking through former Justice HARLAN, declared:

> "The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mails by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails" [161 U. S. at 41].

Later attempts to interpret scienter as requiring knowledge by the defendant of obscenity have similarly failed. The

courts consistently, and as recently as 1962, have applied the reasoning of *Rosen* to hold that knowledge or notice of the contents of the challenged work is sufficient.*

The present problem arises in part from the nature of obscenity which involves two separate questions, usually interwoven in such a way as to make the concept difficult to grapple with. Simply put, is obscenity a question of fact or of law? The element of scienter is normally established by knowledge only of the operable facts. That the wrongdoer did not know that such facts amounted to a crime at law is neither a defense nor an excuse. And in the case of pornography, there is no doubt that a purely factual element exists. For there is objectively perceivable material whose contents, subject matter, and treatment are susceptible of inspection. More specifically, a

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* *Price* v. *United States,* 165 U. S. 311 (1897); *Kahm* v. *United States,* 300 F. 2d 78, 86 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962); *United States* v. *Oakley,* 290 F. 2d 517, 519 (6th Cir. 1961), cert. denied, 368 U. S. 888 (1961); *Schindler* v. *United States,* 208 F. 2d 289 (9th Cir. 1953); *People* v. *Wepplo,* 78 Cal. App. 2d 959, 178 P. 2d 853 (1947); *California* v. *Williamson,* 207 Cal. App. 2d 839, 845 (1962), cert. den. 377 U. S. 994 (1964); *Cincinnati* v. *King,* 168 N. E. 2d 633 (1960).

See also, *People* v. *Finkelstein,* 11 N. Y. 2d 300 (1962), cert. denied 371 U. S. 863 (1962); *State* v. *Hudson County News,* 41 N. J. 247, 196 A. 2d 225 (1963); *Alexander* v. *United States,* 271 F. 2d 140, 145 (8th Cir. 1959); *United States* v. *Hockman,* 277 F. 2d 631, 633 (7th Cir. 1960), cert. denied 364 U. S. 837 (1960); *Wisconsin* v. *Chobot,* 12 Wisc. 2d 110, 106 N. W. 2d 286, 292 (1960), appeal dismissed 368 U. S. 15 (1961); *California* v. *Harris,* 192 Cal. App. 2d 887, 893 (1961), rev'd on other gds., 366 P. 2d 305 (1961); *Connecticut* v. *Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (1962); *Connecticut* v. *Cercone,* 2 Conn. Cir. 144, 196 A. 2d 439, 444 (1963); *Nebraska* v. *Jungclaus,* 176 Neb. 641, 126 N. W. 2d 858, 862 (1964); *Chicago* v. *Doe,* 47 App. 2d 460, 197 N. E. 2d 711, 715 (1964); *Missouri* v. *Vollmer,* 389 S. W. 2d 20 (1965).

distributor, let alone publisher, may be expected to learn the nature of the "dominant theme." The legal significance of these facts is a far more subtle and complex issue beyond the layman's ordinary capacity, involving "a question of constitutional judgment of the most sensitive kind" [*Roth* v. *United States,* 354 U. S. at pp. 497-498, *supra*; *Jacobellis* v. *Ohio,* 378 U. S. at p. 188, *supra*]. Combining these factors, courts have characterized obscenity as a mixed question of fact and constitutional law [*People* v. *Richmond County News,* 9 N. Y. 2d 578, 580-581 (1961)].

Appellant contends, in essence, that because of the special constitutional character of "speech," his foreknowledge must cover both fact and law, and that he escapes culpability unless ne is aware that the material he deals in would be classified obscene by a court. In the absence of a prior restraint upon the particular item, this would necessarily call for an assessment of the outcome of future litigation—all but impossible for even the most trained and knowledgeable lawyers to make.

But beyond this, appellant's conclusion is a logically indefensible as well as practically unenforceable criterion of culpability. Guilt cannot depend upon the putative offender's own appraisal of the legal significance of his conduct. Else a man could acquit himself by his own belief in his innocence. To follow such a course would virtually end the control of pornography, the actual character of the material becoming quite irrelevant. Indeed, while obscenity is separated from constitutionally protected speech by a thin line, its limits require effective enforcement opportunities nonetheless. Scienter requirements

must not be so broad as to allow the line to be covered over by the amateur artist.

> "Accordingly, the proof of scienter that is required to make prosecutions for obscenity cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity" [*Smith* v. *California*, 361 U. S. at p. 164, opinion of Justice FRANKFURTER].

Yet limiting knowledge to the facts alone may present a real dilemma for a distributor, for he may know the contents of a work, but not know it is obscene, the legal question in many instances not being easily resolved. Indeed, even after honest and good faith appraisal, he may still be liable to conviction if a court later disagrees, despite the fact that he intends to commit no crime by dissemination. Thus a man may not know he is a criminal until he is convicted, an outcome not immediately commending itself to common concepts of justice.

However, this consequence is traceable in good measure to the operation of the criminal law, which is confined to a *post facto* review of conduct. The practicalities of crime and enforcement do not lend themselves to prior advisory opinions. Consequently, a defendant is thrown upon his own resources to assess his conduct, and by choosing to act he must assume the risks if he is wrong.

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree" [*Nash* v. *United States*, 229 U. S. 373, 377 (1912)].

However, in *Smith* this Court expressed concern that forcing a distributor to self-censorship might have an in-

hibitory effect on the dissemination of non-obscene material. While, as the Court also recognized, any form of criminal obscenity statute will inevitably have some such effect, the tendency to inhibit should substantially diminish as the character of the material recedes from the area of protection. Viewed in another light, this concern is actually induced by the necessarily blurred definition of obscenity at the borderline, another aspect of the issue of vagueness. In an effort to harmonize a man's before-the-fact assessment of his conduct, and the legal system's after-the-fact review, criminal statutes require "sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice" [*Roth* v. *United States,* 354 U. S. at p. 491, *supra*]. Conversely, a statute is not void for vagueness by failing to define consequences with mathematical precision and certainty. For realistically, a residuum of doubt inevitably and unavoidably shrouds "borderline" conduct.

Realizing, however, that obscenity appraisals are extremely difficult in borderline situations, this Court left open in *Smith* the justification of honest mistake, a defense which would exculpate distributors acting in good faith [361 U. S. at p. 154]. However, an honest mistake concerning the obscenity of the material implies that the mistake must be a reasonable one. Indeed, an unreasonable belief that the law protects material is equivalent to a distributor deliberately remaining uninformed as to the facts of the material. Both approach criminal negligence, which cannot be the nexus of a scienter defense. Addressing himself to a bookseller's refusal to face the facts, Justice FRANKFURTER, concurring in *Smith,* wrote:

> "No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut" [*Smith* v. *California*, 361 U. S. at p. 161].

Indeed in the context of the present case, there is little in the opinions of this Court or of any other court which could have led Mishkin honestly to believe that his publications were not obscene. At least he must have realized that they were very close to the borderline of obscenity, and thus in a dangerous area. He could hardly have entertained a reasonable belief in his innocence. Nor did he act in good faith in disseminating the material, his intent to pander to prurience being clear. The defendant not only dictated the contents of the books, but tailored them to appeal to prurient interests. In this connection, Mishkin's instructions to his writers is conclusive evidence of his knowledge and intent to pander prurience (R. 396, 410-12, 414, 433, 434, 436-7, 446).

Furthermore, proof that Mishkin himself thought his publications were obscene can be inferred from his attempt to disguise his role in their production. The printer of the books thus was told to fabricate the name and address of the publisher and place it on the printed books, Mishkin making certain that his name or the name of any firm associated with him should not appear (R. 181-2). Obviously the appellant was thereby attempting to avoid identification by the enforcement agencies he knew would eventually seek him out.

Beyond this, knowledge of the contents and nature of the books is clearly inferable from the book jackets

which openly proclaim the material contained inside, as they depict in practically all cases the fantasy symbols of fetishism, spankings and sado-masochistic tortures. Concomitantly, the titles in most instances convey the nature of the material, titles such as *Fearful Ordeal in Restraint-land, Bound in Rubber* and *Bondage Correspondence,* for instance, denoting that these were "bondage" books. Additionally, scienter is indicated by the exorbitant prices assessed for just a few pages of poorly bound material [e.g., Exh. 1 (cardboard cover, staple bound, 50 pages for $10.00)], as well as from notations on the exhibits reminding the reader that he is enjoying "contraband" by announcing that the books were "privately printed," some in foreign countries, "for sophisticated collectors of the unusual."

Thus, the appellant knowing the contents and nature of his materials, scienter was established. And indeed, where, as here, the proof of knowledge is so strong, the burden should at least be upon the defendant to come forward to rebut the common sense presumption of scienter naturally arising, if he wishes to establish his own beliefs about the material [see A.L.I. Model Penal Code, Tent. Draft #6, §207.10 (7) (1957)].

## POINT V

### The exhibits were lawfully seized.

The books which formed the basis of the prosecution were obtained by the police during the course of five separate seizures, one from a warehouse, and four from book stores. The warehouse seizure on January 12, 1960, uncovered the books admitted into evidence as Exhibits 1 to 42 (R. 137-8). The seizure at the Publishers Outlet Store on December 29, 1959, netted Exhibits 43 through 67 (R. 144-7), the seizure at Midget Book Shop on the same date added Exhibit 68 (R. 151), and Exhibits 69 through 71 were seized at The Main Stem Book Store on February 10, 1960 (R. 154-5). Exhibit 72, the book *Queen Bee* which Mishkin published, was purchased by a policeman a year earlier at Publishers Outlet (R. 164-6).

#### *Concerning the Seizure from the Warehouse*

Norman Levenberg, who printed all but four of the exhibits for Mishkin (R. 193-253), also stored them for the appellant in Room 908 of the building at 37 West 20th Street, where he had his shop. The lease for the storage room was in Levenberg's name (R. 188), although Mishkin gave Levenberg $100 per month in cash to pay the rent (R. 185, 189). The maintenance of the warehouse was first entrusted to a man hired by Mishkin (R. 188), but in March, 1959, after firing the caretaker, the appellant convinced Levenberg to assume those duties, Levenberg thus obtaining control of the warehouse and its contents (R. 188-9, 279). Additionally, Levenberg would make deliv-

eries of books in the warehouse to Mishkin's stores at the appellant's request (R. 189-90), and at times shipped some of the books "out of town" at Mishkin's behest (R. 254).

In November of 1959 Mishkin informed Levenberg that the police had the warehouse under surveillance, and advised him to "stay away" (R. 187-8). But fearful because his name was on the lease, Levenberg transferred the books to the basement of the same building as soon as he could (R. 188). Further, since Mishkin told him to "get rid of everything I had" because "it was hot" (R. 275-6), Levenberg began moving the books out of the warehouse altogether, sending many of them to another place he rented in Brooklyn (R. 314).

At the same time, the police had been negotiating with Levenberg's lawyer, with Levenberg's knowledge and consent (R. 304), in order to enlist the printer's cooperation. The lawyer's presence and participation, moreover, assured that no coercion would be applied to the printer, and, indeed, Levenberg unequivocally stated, "The police never threatened me. It is a funny thing; they never threatened me" (R. 305).

Finally, on January 12, 1960, after conferring with his attorney, Levenberg made up his mind: "we decided to give the police the warehouse" (R. 302). After informing Levenberg when they intended to arrive, the police dutifully obtained a search warrant (R. 134-5), and then proceeded to the basement where the books lay, the printer coming down to meet them (R. 304). Several days later Levenberg gave cover drawings which he had kept to his attorney to give to the police (R. 272-3).

Clearly, then, Levenberg, after deciding to cooperate, consented to the police seizure of the books, and the appellant does not dispute that the consent was voluntary. The only question remaining, therefore, is whether the seizure of evidence belonging to a defendant is lawful where it is taken pursuant to the consent of an accomplice, in actual control of the material.

While this Court has left open the question of whether one in lawful possession of articles or in control of the premises in which they are found can bind a joint owner by his consent [see, *Amos* v. *United States,* 255 U. S. 313 (1920)], lower federal courts have almost unanimously held that he can.

In *Driskell* v. *United States* [281 F. 146 (9th Cir. 1922)] appellant constructed a garage on property rented to him, with the understanding that the garage was built for the use of another renter. The consent of the renter to a seizure of barrels of illicit liquor stored there was sustained by the court.

In *Curry* v. *United States* [192 F. 2d 571 (5th Cir. 1951)] the appellant paid the rent upon a dwelling for the use and occupancy of other persons. The court sustained a search and seizure of liquor pursuant to the consent of an occupant after a finding that appellant was not in possession when the search was made, nor did he occupy it as his residence, nor was he present during the search.

In *United States* v. *Sferas* [210 F. 2d 69 (9th Cir. 1954), cert. denied 347 U. S. 935 (1954)] one partner's consent to a search of a business premises was upheld against his

partner on the grounds that both had equal use and occupancy.

In *United States* v. *Antonelli Fireworks Co.* [155 F. 2d 631 (2d Cir. 1946)] the consent of an office manager of a corporation to examination of records was held to validate the search since he was in sole control of both the office and the records.

In *Gillars* v. *United States* [182 F. 2d 962 (D. C. Cir. 1950)] a search and seizure of recordings used in a treason prosecution was upheld when the records were taken from a basement in enemy territory with the consent of the custodian.

In *Reszutek* v. *United States* [147 F. 2d 142 (2d Cir. 1945)] the court held that the consent of those admittedly "in charge" of a six-family house as "superintendents" to the search of a cellar was valid against the owner.

In *United States* v. *Eldridge* [302 F. 2d 463 (4th Cir. 1962)] the search of a car with the consent of a friend who had borrowed it was deemed valid against the owner.*

Consequently, the printer Levenberg being in lawful control of both the property and the premises, his consent

* Other cases have followed the rationale's underlying this line of decisions: *United States* v. *Goodman*, 190 F. Supp. 847, 850 (N.D. Ill. 1961); *Application of Fried*, 68 F. Supp. 961 (D.C.N.Y. 1946); *Bowles* v. *Chew*, 53 F. Supp. 787 (D.C. Cal. 1944); *United States* v. *Sergio*, 21 F. Supp. 533 (D.C.N.Y. 1937); *United States* v. *Heine*, 149 F. 2d 485 (2d Cir. 1945); *Stein* v. *United States*, 166 F. 2d 851 (9th Cir. 1948); *Cutting* v. *United States*, 169 F. 2d 951 (9th Cir. 1948); *Calhoun* v. *United States*, 172 F. 2d 457 (5th Cir. 1949); *United States* v. *Walker*, 190 F. 2d 481 (2d Cir. 1951), cert. denied 342 U. S. 868 (1951).

to a search and seizure was completely valid, and the evidence procured from the premises could be used against Mishkin, the owner and publisher of the books. Indeed, appellant cites no case which contradicts this conclusion. The holdings of this Court which bar the owner of a hotel from consenting to the search of a room occupied by a guest [*Stoner* v. *California,* 376 U. S. 483 (1964); *Lustig* v. *United States,* 338 U. S. 74 (1949); *United States* v. *Jeffers,* 342 U. S. 48 (1951)], or of landlords consenting to a search of a tenant's room [*Chapman* v. *United States,* 365 U. S. 610 (1961)], moreover, are inapposite, and appellant's failure to refer to them is perhaps evidence that he realizes the distinctions. For realistically, as the Court has stressed, the innkeeper or landlord has no right of possession to the property or, while the guest or tenant is in residence, to the premises. When the guest checks out, of course, the owner of the hotel can consent to a search of the room [*Abel* v. *United States,* 362 U. S. 271 (1959)]. And indeed, where the search area is not a private premises, but a storeroom, to which both landlord and tenant have equal use, it has been held that the landlord's consent to search is valid against the tenant [*People* v. *Hicks,* 331 P. 2d 1003, 165 Cal. App. 2d 548 (1959), cert. den. 359 U. S. 981 (1959)]. In the present case the person who gave consent was the bailee of the property, having proper possession of it through the agreement of the owner, and the warehouse, paid for by Mishkin, but in the name and control of the printer, was virtually a joint business premises. In short, Levenberg's lawful possession of the books entitled him legally to turn them over to the police.

Moreover, even after Levenberg had agreed to surrender the books, the police obtained a search warrant for

the warehouse, and seized the books pursuant to its direction (R. 134-5). At the trial, Inspector Plansker testified to these facts, and the prosecutor advised the court that the warrant had ben issued by a certain magistrate on the day of the seizure (R. 134-5). Upon learning that a Lieutenant Dimler rather than the inspector had obtained the warrant, and that the prosecution anticipated calling the lieutenant as a witness, the defense counsel stated, "Well, this is all, then, subject to my examination of Lieutenant Dimler as to the adequacy of the search warrant" (R. 135-6). The lieutenant, however, was not called as a witness, but instead the prosecution and defense stipulated that, if he were called, he would testify relative to the defendant's execution of an arraignment card (Exh. 97) at the time of his arrest (R. 639).

Thus, by stipulating to Dimler's testimony, defendant waived the issue of sufficiency of the warrant. And that issue, therefore, is unavailable to him on this appeal [see, *People* v. *Friola,* 11 N. Y. 2d 157 (1962); *People* v. *Wilson,* 16 App. Div. 2d 207 (1st Dept. 1962)]. Concomitantly, the defendant has totally failed in his burden to establish that the warrant was invalid [*Batten* v. *United States,* 188 F. 2d 75 (5th Cir. 1951); *United States* v. *Rellie,* 39 F. Supp. 21 (D. C. N. Y. 1941); *United States* v. *Warraington,* 17 F. R. D. 25 (D. C. Cal. 1955)].

***Concerning the Seizures at the Bookstores***

The balance of the books (Exh. 43-72) were seized variously at The Publishers Outlet Store, Midget Book Shop, and The Main Stem Book Store, all premises open to the

public with shelves and rack displaying books and magazines (R. 144, 150, 153).

Police officers, of course, have the right, enjoyed by the general public, to enter shops and examine books displayed for sale. Observing articles open to view scarcely amounts to a search within the purview of the Fourth Amendment [*Hester* v. *United States,* 265 U. S. 57 (1934); *United States* v. *Lee,* 274 U. S. 559 (1927); *Ellison* v. *United States,* 206 F. 2d 476, 478 (D. C. Cir. 1953); *Fisher* v. *United States,* 205 F. 2d 703 (D. C. Cir. 1953), cert. denied, 346 U. S. 872 (1953)]. Obviously, from the nature of the books, immediately evident to the casual observer, the police at least had probable cause to believe they were obscene, and of course, knew they were intended for sale. Consequently, an arrest of the possessor on these grounds was justified, and the books, as the instrumentalities and means by which the crime was committed, as well as being contraband, became subject to seizure incident to the arrest [*Agnello* v. *United States,* 269 U. S. 20 (1925); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *United States* v. *Rabinowitz,* 339 U. S. 56 (1950); *People* v. *Matherson,* 16 N. Y. 2d 509 (1965); *People* v. *Peskin,* 16 N. Y. 2d 511 (1965)]. In this regard, although the trial of Mishkin occurred before the decision in *Mapp* v. *Ohio* [367 U. S. 343 (1961)], and thus no motion to suppress was made, the record shows that at least two of the seizures were in fact accompanied by arrests. On December 29, 1959, at Publishers Outlet, the salesman Cosky and two others were taken into custody contemporaneously with the seizure (R. 157). On the same day, at the Midget Book Shop, the man in charge, William Schenkman, was similarly arrested at the time of the sei-

zure (R. 160). Consequently, the arrest for possession with intent to sell being valid, these incidental seizures did not violate Fourth Amendment requirements.

The third seizure, on February 10, 1960, at the Main Stem Book Store resulted in the gathering of three exhibits (Exhs. 69-71). Although the record does not show whether an arrest accompanied the collection of evidence, the seizure is nevertheless valid on other grounds. For a seizure of contraband open to view is a constitutional seizure [*United States* v. *Lee*, 274 U. S. 559 (1927); *People* v. *Cataneo*, 126 N. E. 2d 692, 6 Ill. 2d 122 (1955); *People* v. *Defore*, 242 N. Y. 13, 18 (1926); *United States* v. *Lefkowitz*, 285 U. S. 452 (1932)]. Obscene books, of course, are undoubtedly contraband [*United States* v. *Peisner*, 311 F. 2d 94, 101 (4th Cir. 1962)].

Finally, Exhibit 72 was obtained by the police a year earlier at Publishers Outlet. At that time, an officer purchased the book and arrested the seller, Herman Schenkman (R. 164, 166).* The sale thus takes the gathering of this exhibit out of the ambit of the Fourth Amendment, for the officer thereby acquired clear title to possession of the book [*People* v. *Reshes*, 39 Misc. 2d 723 (N. Y. Co. 1963)].

Appellant and *amicus* object to the seizures, however, viewing obscenity as a unique area requiring special treatment. Both draw upon language in *Marcus* v. *Search Warrants* [367 U. S. 717 (1961)] and *A Quantity of Books* v. *Kansas* [378 U. S. 205 (1964)] to argue that a judicial de-

* Schenkman was later found guilty on an obscenity charge, *People* v. *Schenkman*, 20 Misc. 2d 1093, 195 N. Y. S. 2d 570 (1960).

termination of obscenity, after adversary proceedings, is constitutionally required before publications may be seized.

But both *Marcus* and *Quantity* concern, not criminal prosecutions, but an auxiliary means of attacking obscene material—civil suppression through injunction, a form of relief approved in *Kingsley Books, Inc.* v. *Brown* [354 U. S. 436 (1957)]. Injunction statutes, however, are not always surrounded by due process safeguards automatically attending criminal prosecutions, and *Marcus* and *Quantity* are examples of civil procedures presenting problems of unconstitutional prior restraints. In *Marcus* and *Quantity,* it was the civil procedures for issuing warrants and determination of obscenity which were imperfect, and those decisions sought only to bring civil procedures up to the level of the criminal process. They did not declare that the criminal procedure was defective [*United States* v. *Peisner,* 311 F. 2d 94, *supra*].

Seizure pursuant to injunction may impinge directly on the First Amendment, whereas a seizure antecedent to a criminal prosecution is cognizable under the Fourth. For civil remedies proceed directly against a publication, the sole issue being the nature of the material. Any seizure of books to enjoin distribution, then, threatens the rights of the community to receive the material. And such seizures, prior to adversary proceedings on the question of obscenity, run the risk of assimilating non-obscene matter. But in the criminal proceeding, the issue is not suppression of books, but whether the defendant, by his conduct, has committed a crime. Probable cause that he has committed a crime serves to bring him to trial, the seizure

of publications becoming a gathering of evidence of the defendant's actions, and being purely incidental to the arrest. Thus a seizure of books for purposes of criminal trial concerns only the rights of security of the individual defendant. No issue of prior restraint against a publication is presented, for society's right to receive the material is not impaired by the detention of the defendant or the material. Indeed, aside from a possible subsidiary *in terrorem* effect of the arrest, a result not of constitutional significance [*Kingsley Books, Inc.* v. *Brown,* 354 U. S. at p. 442, *supra*], no restraint can run against the material until after a trial where all due process protections are present. Thus the penal procedure reviews conduct, which it has reason to believe is prohibited, after the event has taken place. It does not restrain expression before it occurs, the typical censorship situation. First Amendment considerations enter the criminal case only in the testing of the material at the trial.

Accordingly, the distinction in *Marcus* and *Quantity* between obscene publications and common forms of contraband such as drugs and gambling paraphernalia does not obtain in a criminal case. For in a civil proceeding, a seizure of books immediately raises First Amendment considerations of prior restraints. Seizure for prosecution, however, avoids restraints, and obscene publications then remain on the same level, and become subject to the same treatment as other contraband articles. Seizure, then, is appraised solely in terms of normal Fourth Amendment rules.

Thus, the real question concerning criminal seizures is whether, under the Fourth Amendment, a police officer may

perform an arrest or seize books by deciding himself that they are contraband or instrumentalities of a crime, since such a decision involves a complex legal determination. Indeed, in *United States* v. *Peisner* [311 F. 2d 94, *supra*] the Fourth Circuit agreed that no prior adversary hearing was required, but thought that at least one of the officers who seized the material should be familiar with the *Roth* formula. However, knowledge of *Roth*, while it obviously would not hurt, really relates to a finding of probable cause, being one factor aiding the police in determining that an offense has been committed. And probable cause, the recognized foundation upon which an arrest may lawfully be performed, is the determination entrusted to the police.

It is, of course, axiomatic that probable cause need not be sufficient to convict [e.g., *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Carrol* v. *United States*, 267 U. S. 132 (1925)], and thus the validity of the arrest or seizure does not hinge on the legal result of the trial. In terms of obscenity prosecutions, the seizure turns on the facts and circumstances within the officer's knowledge, as it does in any other Fourth Amendment review, and not upon the subsequent legal evaluation of those facts. Consequently, the judgment required of an arresting officer is not nearly as complex as the ultimate finding. He does not have to decide that the material is actually obscene. Indeed, the police are constantly faced with similar decisions in other fields of law enforcement. For instance, a narcotics arrest or seizure is commonly made upon discovery of a glassine envelope containing a white powder, since an officer may reasonably believe the powder to be heroin. However, that it is in fact heroin cannot be determined until later testing.

Similarly, the reasonable belief that material is obscene, culled from the superficial appearance and contents of the material, is sufficient to validate an arrest or seizure.

Thus, there being no question that the criminal procedure can be invoked to convict a defendant for disseminating obscene books [*Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, *supra; Roth* v. *United States*, 354 U. S. 476, *supra*], there should then be no question that the normal channels of the criminal process can be applied to implement prosecution. Accordingly, if there is probable cause for arrest, evidence of crime may be seized without a warrant incident to that arrest, as it may in any criminal case, and contraband, open to view, is subject to seizure, limited only by the rule of reason [*People* v. *Matherson*, 16 N. Y. 2d 509, *supra*]. There was no abuse of such just procedure in obtaining the evidence in the instant case. Nor was any prior determination of obscenity requisite to the commencement of a criminal action.

## Conclusion

***The judgment below should be affirmed.***

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

**No 49**

EDWARD MISHKIN,

*Appellant,*

—against—

THE STATE OF NEW YORK,

*Appellee.*

## BRIEF OF THE CITIES OF NEW YORK, CHICAGO, LOS ANGELES, DENVER AND ST. PAUL, *AMICI CURIAE*

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Statement | 1 |
| Interest of the *Amici* | 1 |
| ARGUMENT | |
| The Nature of the Books Involved | 5 |
| The Books are Clearly Obscene under the Test of Obscenity Established by the Decisions of this Court | 5 |
| A. The test of obscenity | 5 |
| B. Predominant appeal to "prurient interest" | 6 |
| 1. Definition of "prurient interest" | 6 |
| 2. The "bondage" books | 6 |
| 3. The books other than of the "bondage" type | 14 |
| C. Patent offensiveness | 15 |
| Conclusion | 17 |


### Cases Cited


| | |
|---|---|
| Golaris v. Jewel Tea Co., 22 F. R. D. 16 (D. C. N. D., Ill., 1958) | 7 |
| Jacobellis v. Ohio, 378 U. S. 184 | 5, 15, 17 |
| Kingsley Books, Inc. v. Brown, 354 U. S. 436 | 2 |
| Klaw v. Schaffer, 151 F. Supp. 534, aff'd on opinion below, 251 F. 2d 615 | 12 |

PAGE

Manual Enterprises v. Day, 370 U. S. 478, reversing 289 F. 2d 455 ..... 5, 6, 9, 11, 13, 15-17

People v. Finkelstein, 11 N. Y. 2d 300, cert. den., 371 U. S. 863 ..... 14

People v. Fried, 18 App. Div. 2d 996, cert. den., 378 U. S. 578 ..... 14

People v. Richmond County News, 9 N. Y. 2d 578 ..... 15

People v. Zucker, 15 App. Div. 2d 883, cert. den., 371 U. S. 863 ..... 12

Roth v. United States, 254 U. S. 476 ..... 5, 6, 10, 11, 17

Tolfree v. Wetzler, 22 F. 2d 214, rev'd on other grounds, 25 F. 2d 553, cert. den., 278 U. S. 628 ..... 7

United States v. Klaw (unreported; opinion annexed to appellant's brief as Appendix B) ..... 13

Von Eye v. Hammes, 147 F. Supp. 174, aff'd 245 F. 2d 756 ..... 7

**Other Authorities Cited**

31A C. J. S., §79, pp. 81-85 ..... 7

31 C. J. S., §12 p. 833 ..... 7

"Sexual Behavior of the Human Female," Indiana University Institute for Sex Research ..... 7

"Variations in Sexual Behavior" (1957), Dr. F. S. Caprio ..... 8

Wigmore on Evidence (3rd ed.), Vol. IX, §2568a, p. 537 ..... 7

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

**No 49**

EDWARD MISHKIN,

*Appellant,*

v.

THE STATE OF NEW YORK,

*Appellee.*

## Statement

This brief *amici curiae* is submitted under the authority of Rule 42, Subd. 4 of the Rules of this Court, permitting a political subdivision of a state, without the consent of the parties to a case, to file a brief *amicus curiae* sponsored by the authorized law officer of the municipality.

## Interest of the *Amici*

**1.**

Municipal officials and the chief legal officers of the nation's municipalities are directly concerned with the problems created by the circulation of obscene publications.

Laws prohibiting the dissemination of obscene matter are universal among our states. This legislation reflects the conviction of the overwhelming majority of our people that distribution of obscene publications is socially harmful and tends to degrade and debase our society.

For city and other local officials, the traffic in obscene materials is a troublesome and recurring municipal problem. Because of the legal complexities involved in efforts to cope with this problem, local administrations necessarily turn to their municipal attorneys for advice as to lawful and effective remedial measures.

Some municipal law officers have a direct statutory duty and responsibility to combat the dissemination of obscene publications. For example, under §22-a of the New York State Code of Criminal Procedure, the chief law officer of any city, town or village in that state has power to maintain civil proceedings to restrain the sale or distribution of obscene matter. The constitutionality of this statute was sustained by this Court in *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957).

Prevention of the distribution of obscene matter, considered as a law enforcement task, is in most jurisdictions primarily a responsibility of the municipal police. They often consult with the municipal attorney for advice on legal questions encountered in this field.

Moreover, when it comes to the attention of citizens of a municipality, or of its civic, religious or community leaders, that matter considered by them to be obscene is being circulated in their area, they commonly communicate in the first instance with the mayor or other municipal executive. In such situations, the local administration frequently consults with the municipal attorney for counsel as to appropriate action.

Municipal administrative officials and municipal law officers are thus directly concerned with efforts to prevent the dissemination of obscene materials and with enforcement action seeking to establish that particular publications or types of matter fall within the lawful prohibitions of anti-obscenity statutes. Where public opinion in a municipality evidences a judgment that matter being distributed there transgresses the bounds of decency, and the municipal attorney believes that no infringement of constitutional safeguards is at issue, it is fitting and appropriate for the municipal officers, as servants of the community involved, to support court proceedings brought to vindicate the public verdict of condemnation.

Finally, when it is known to the officials and municipal attorney of a community that public opinion in the locality indorses the endeavors of other communities, through legal proceedings, to curb the dissemination of obscene matter, it is similarly appropriate that these officers support the position of the other communities in such proceedings.

**2.**

Large and broadly representative groups in our municipal populations are evidencing a strong and growing concern over the tide of obscene and indecent publications which envelops their areas.

The report submitted to Mayor Robert F. Wagner of New York City in April, 1965, by the Mayor's Citizens Anti-Pornography Commission, a group of New York City residents representing a cross-section of the entire community, expresses this concern in compelling terms, and voices the widely held conviction that the public welfare requires strong and effective action to stem this tide of salacious and degrading matter.

One of the principal reasons for the establishment of the Commission was to provide a body of citizens constituted so as to be capable of accurately reflecting and expressing the community's standards of decency regarding treatment of sexual themes in published material.

The Commission examined a number of books and magazines in circulation which were complained of as obscene by outraged citizens and community groups. Before the Commission undertook its study, it was carefully informed by the New York City Corporation Counsel of the tests of obscenity established by the decisions of this Court and the New York Court of Appeals.

Among the Commission's conclusions were unanimous findings that various books which it examined, including a number indistinguishable from books of the "Queen Bee" type involved in this case, grossly violate contemporary community standards of decency.

In its report, the Commission commented on recent decisions of the courts holding that books such as "Tropic of Cancer" and "Memoirs of a Woman of Pleasure", and certain other publications, do not violate obscenity statutes. The Commission expressed the view that, in so far as these rulings declare that such books and publications do not overstep contemporary community standards of decency, the courts have misapprehended such community standards and have erroneously attributed to the public a lax view of propriety in published descriptions or representations of sexual matters.

Many communities throughout the country have shown strong interest in the work of the Commission. Moreover, there have been widespread indorsements of the Commissions recommendations of active citizens' programs for the purpose of clearly demonstrating the quality and character of community standards of decency.

## *ARGUMENT*

### The Nature of the Books Involved

The books at issue are plainly devoid of any semblance of literary, artistic or scientific merit or value. There can be no pretense that they advocate ideas.

This case is somewhat unique in that the purpose of the authors and artists who wrote and illustrated most of the subject books may be gathered from their express testimony in the record. The authors were in effect directed by appellant to write with the prime object of exciting erotic desires. Appellant's instructions, in summary, were to load the books with detailed and lurid portrayals or symbols of perverted, abnormal and licentious sex (Hackshaw, 1227-35, 1242; Johnson, 1297-8, 1307, 1337-8; Rosen, 1187).

It is clear that these books do not seek to convey anything of literary, artistic or conceptual significance, but are rather designed for the sole purpose of functioning as a aphrodisiac.

### The Books are Clearly Obscene under the Test of Obscenity Established by the Decisions of this Court

The books fall squarely within the test of obscenity laid down in *Roth* v. *United States,* 254 U. S. 476, 489 (1957) and reiterated and further explained in *Manual Enterprises* v. *Day,* 370 U. S. 478, 482-486 (1962) and in *Jacobellis* v. *Ohio,* 378 U. S. 184, 191-195 (1964).

#### A. The test of obscenity

In *Roth* this Court stated the basic element of the test to be (354 U. S. at p. 489):

> "Whether to the average person, applying contemporary community standards, the dominant theme of

the material taken as a whole appeals to prurient interest."

In *Manual Enterprises,* it was stated that a further element of the test is that the challenged material must be "patently offensive," i.e. it must affront "current community standards of decency * * *" (370 U. S. at pp. 482, 486).

In *Jacobellis,* this Court reiterated and elaborated on the above standards, declaring that the *Roth* test "requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such [sexual] matters.' " (378 U. S. at p. 191 [interpolation supplied]). This Court further stated in *Jacobellis* that "material dealing with sex in a manner which advocates ideas * * *, or that has literary or scientific or artistic value or any other form of social importance may not be branded as obscenity * * *." (*ibid.*)

**B. Predominant appeal to "prurient interest"**

***1. Definition of "prurient interest"***

In *Roth,* this Court approved a definition of "prurient interest" which declares that this term means " 'a shameful or morbid interest in nudity, sex * * *'." (354 U.S. at p. 487)

***2. The "bondage" books***

**(a)**

The subject books of the so-called "bondage" type predominantly feature flagellation, torture or other physical abuse of persons who are verbally or pictorially represented as simultaneously experiencing pain and pleasure during

their ordeal. Sexual fetishism is also prominent in many of these books, in the form of displays of whips, ropes, belts and other articles conveying the imagery of this form of sexual perversion. The dominant theme of this type of book is the infliction of pain, portrayed in a manner designed to stir morbid sexual excitement among those who respond erotically to depictions of sadism and masochism.

**(b)**

It is clear from applicable principles of judicial notice that the courts may take judicial notice of the appeal of the "bondage" books to the "prurient interest" of those susceptible to this kind of sexual stimulation.

Under the authority of the courts to take judicial notice of well established scientific facts, they may judicially notice the diseases to which mankind is subject, including well known facts relating to emotional and mental disturbances. *Von Eye* v. *Hammes,* 147 F. Supp. 174, 182 (D. C., Minn., 3rd Div., 1956), aff'd 245 F. 2d 756 (Ct. App., 8th Circ., 1957); *Golaris* v. *Jewel Tea Co.,* 22 F.R.D. 16, 20 (D. C., N. D., Ill., 1958); 31A C.J.S. §79, pp. 81-85.

In taking judicial notice of scientific facts, the courts may refer to scientific treatises and studies and like sources of information. *Tolfree* v. *Wetzler,* 22 F. 2d 214, 224-225 (D. C., N. J., 1927), rev'd on other grounds, 25 F. 2d 553 (Circ. Ct. App., 3rd Cir., 1928), cert. den. 278 U. S. 628 (1928); Wigmore on Evidence (3rd ed.), Vol. IX, §2568a, p. 537; 31 C.J.S. §12, p. 833.

The form of sex abnormality characterized by erotic responses to sadism or masochism (or portrayals thereof) is a well known phenomenon in the behavorial sciences and is described in leading scientific treatises dealing with sexual disorders (e.g., "Sexual Behavior of the Human Fe-

male," Indiana University Institute for Sex Research, pp. 676-681; "Variations in Sexual Behavior" (1957), Dr. F. S. Caprio, pp. 206, 265, 271, 273).

The appellant in this case was tried and found guilty by three judges of the New York City Court of Special Sessions, who, after considering the nature and characteristics of the subject "bondage" books, determined them to be obscene (26 Misc. 2d 152, 155-157). The observations of these judges in their opinion show that they recognized the appeal of these books to sick and abnormal sex urges through portrayals of sadism and masochism (26 Misc. 2d at pp. 155-156). The trial court thus in effect took judicial notice of the capacity of the books to excite the sexual reactions of the deviant audience for which they are intended. As has been demonstrated, the trial court was amply warranted in judicially noticing this fact.

**(c)**

The morbidly sexual displays of sadism and masochism in the "bondage" books are not exculpated because the "average person", representative of the majority, normal elements of the population, may not find them sexually stimulating.

Gross forms of indecent materials could be freely circulated if the criterion of appeal to "prurient interest" could not be satisfied without a demonstration that the matter in question is capable of stirring a morbid or shameful interest in sex on the part of the entire population.

For example, under such a theory, the test of obscenity would not condemn a deliberately pornographic publication devoted solely to the most detailed, sordid and indecent descriptions of particular forms of abnormal sex acts which the heterosexual majority of the population would find disgusting, but not stimulating sexually.

At the same time, accounts of some forms of abnormal sex may be erotically stimulating to a substantial number of normal individuals.

The conclusion is impelled that a reasonable application of the "prurient interest" element of the test does not require the courts to conduct psychiatric, sociological and statistical surveys in an effort to ascertain how large a proportion of the population would be erotically stimulated if exposed to material having less than general sexual appeal.

Judicial precedent supports the view that in situations where matter is designed to stimulate the sex desires of particular classes of persons, and may not be sexually stimulating to the normal individual, the "average person" component of the "prurient interest" standard is satisfied if the material is capable of exciting the "prurient interest" of the average member of the audience at which the material is aimed.

In *Manual Enterprises,* the Court of Appeals ruled that the "prurient interest" element of the test is satisfied if the publication in question predominantly appeals to the "prurient interest" of the average person who is a part of its intended readership (289 Fed. 2d 455 [1961]). Magazines featuring photographs erotically stimulating to homosexuals only were held by the Court of Appeals to be within the "prurient interest" standard because the publications would arouse the sex desires of the average homosexual. While this Court set aside the determinations below that the magazines were obscene, none of the prevailing opinions expressed the view that the Court of Appeals had erred in applying the "prurient interest" criterion in the manner described above. Mr. Justice Harlan, writing with the concurrence of Mr. Justice Stewart, found that the magazines were not patently offensive and therefore not

obscene, and on this basis, did not reach the question as to whether the Court of Appeals had correctly interpreted the "average person" element of the test.

It is submitted that the Court of Appeals gave the phrase, "average person", a reasonable and permissible interpretation in holding that the term can be construed as meaning the average reader for whom the material is intended, in cases where abnormal sex is involved. Under this interpretation, the "bondage" books plainly fall within the test of obscenity.

As has been demonstrated, *supra,* it is a well known scientific fact, judicially known to the courts, that this material is sexually stimulating to the deviates for whom it is intended. It is obvious, therefore, that the dominant theme of these books is an appeal to the "prurient interest" of devotees of sex-centered sadism, masochism and fetishism. The books have no other theme or purpose.

The application of the test to these books must be approached with due recognition of the serious results of an interpretation requiring a general erotic appeal as the measure of pruriency. As is pointed out *supra,* such a requirement would immunize the most flagrant pornography, so long as its prurient appeal is addressed to a minority.

**(d)**

It will be noted that the "average person" element of the *Roth* test specifies that the material transgresses where *"to* the average person, applying contemporary community standards" (emphasis supplied) the dominant, overall theme is an appeal to "prurient interest". Thus, under circumstances such as those presented by the "bondage" books, the criterion can be the judgment or view of the average person as to the capacity of the material to pro-

duce a prurient effect on the limited class susceptible to it, and the test need not be confined to the sexual response (or lack of it) which the material is capable of producing in the average individual.

It follows that the test is satisfied in these situations if the average person can recognize that the material excites a morbid and shameful interest in sex on the part of the audience to which the material is addressed.

The test does not require proof of the actual effect of the material on any person. The controlling criterion is the capacity or potential of the material for appeal to "prurient interest". This is borne out by the observation of Mr. Justice Harlan and Mr. Justice Stewart, in their prevailing opinion in *Manual Enterprises,* that the Federal statute forbidding the mailing of obscene matter is to be interpreted, under the *Roth* test, as condemning "such material irrespective of the *effect* it may have on those into whose hands it falls * * *" (370 U. S. at pp. 483-484).

The average citizen is well aware of the various forms of sex deviation and perversion. They are mentioned and discussed in popular literature (e.g., "East of Eden", by John Steinbeck, describes masochistic practices in a bordello [pp. 236, 322]). Such abnormalities present social and penological problems which are constantly before the public and which therefore make these phenomena an integral part of public knowledge. The average person, therefore, is capable of recognizing matter which depicts these deviations or is calculated to inflame the desires of their practitioners.

Thus, when publications featuring such matter are being circulated, the average citizen is able to judge whether their dominant appeal, in the light of contemporary community standards, is to a shameful or morbid interest in sex on the part of the deviates or perverts for whom the material is intended.

The "bondage" books clearly fall within this construction of the "prurient interest" element of the test. It is recognizable to the average citizen that these books excite morbid and shameful sex impulses in perverted individuals who are stimulated by sexually permeated exhibitions of sadism, masochism and fetishism.

**(e)**

In several prior cases involving "bondage material" identical in nature with that here at issue, both the Federal courts and the courts of New York State have not hesitated to rule such material obscene.

In *Klaw* v. *Schaffer,* 151 F. Supp. 534 (D. C., N. Y., 1957), aff'd on opinion below, 251 F. 2d 615 (2nd Circ., 1958), a distributor of "bondage" material and other matter sued to enjoin enforcement of an order of the Post Office Department barring the "bondage" material and other items from the mails as obscene. Summary judgment was granted dismissing the suit.*

In *People* v. *Zucker,* 15 App. Div. 2d 883 (1st Dept., 1962), cert. den. 371 U. S. 863 (1962), the defendant was prosecuted for violation of the New York State statute forbidding dissemination of obscene matter (Penal Law, §1141) by reason of his having offered for sale certain matter, including "bondage" books similar to those here concerned. It was held that the books were obscene and that the defendant had been properly convicted for dealing in these "bondage" publications.

---

* The plaintiff Klaw applied for certiorari in order to obtain review of the decision of the Court of Appeals, but this Court did not pass on the application on the merits. On the ground that Klaw had failed to make timely substitution of the proper postal officer for Schaffer, who had resigned, this Court vacated the judgment below and remanded the case to the District Court, with instructions to dismiss Klaw's complaint as abated (357 U. S. 346 [1958]).

In *United States* v. *Klaw* (unreported; opinion annexed to appellant's brief as Appendix B) heavily relied on by appellant, a jury found the defendants guilty of mailing obscene matter and certain related offenses, on the basis of defendants' distribution of "bondage" publications similar to those at issue. The Court of Appeals set aside the conviction on the ground that there was insufficient proof to enable a jury to determine that defendants' publications appealed to "prurient interest". The view of the Court of Appeals appears to be that "bondage" material may not be made the basis of an obscenity conviction by "judge or jury without any proof demonstrating that it has the proscribed effect on any of our citizenry" (appellant's brief, Appendix B, p. 56). But this theory that an actual prurient effect must be proved is directly contrary to the statement of Justices Harlan and Stewart in *Manual Enterprises* (*supra*, p. 11) that the *Roth* test does not require proof that any person was actually affected, but only that it be apparent that the material has the capacity to arouse "prurient interest".

The *Klaw* prosecution is clearly distinguishable from the case at bar, since the appellant Mishkin was tried by a court sitting without a jury. As has been pointed out *supra*, p. 8, the Court of Special Sessions, in its opinion in this case, expressly recognized that the publications which it condemned as obscene included "sadistic" and "masochistic" material (26 Misc. 2d at p. 156). Special Sessions, in applying the *Roth* test, thus took cognizance of the nature of the appeal of the "bondage" books to the "prurient interest" of the sexually abnormal persons who respond to this form of erotic stimulus. The authorities cited *supra*, pp. 7-8, demonstrate that the trial court was entitled to take judicial notice of these matters.

As a justification for its decision in the *Klaw* prosecution, the Court of Appeals cites rulings of the courts find-

ing various publications such as "Tropic of Cancer" and "Fanny Hill" not be obscene, suggesting that if such books are exonerated, it would be unfair to condemn "bondage" books (appellant's brief, Appendix B, pp. 54-55). This line of argument overlooks the fact that the exculpation of the publications cited by the Court of Appeals rests or may be interpreted as resting on a determination that they possess literary or artistic merit or attributes of social importance. There is no pretense that "bondage" books possess any such characteristics.

It is submitted that the Court of Appeals underestimated the knowledge and understanding of the average man, in concluding that without explanatory testimony or evidence, he is unable to discern the prurient appeal of "bondage" material.

**3. The books other than of the "bondage" type**

The other books are devoted to portrayals of sexual episodes and abnormal sex practices in terms which are, in general, calculated to arouse erotic excitement in the average, normal individual. These books include descriptions of heterosexual and homosexual seductions, as well as rape, sodomy and masturbation. The contents of these books are flagrant examples of the pornographer's craft and plainly come within the "prurient interest" standard.

In *People* v. *Finkelstein,* 11 N. Y. 2d 300, 305 (1962), one of these books, "Queen Bee", which is typical of a number of the others, was held to be obscene by the New York Court of Appeals under the *Roth* test. This Court denied certiorari *in the Finkelstein case* (371 U. S. 863 [1962]).

In *People* v. *Fried,* 18 App. Div. 2d 996 (1st Dept., 1963), the New York Court upheld an obscenity conviction based upon the sale of photographs and a book entitled "College

for Sinners." This book is similar in its offensive characteristics to those (other than of the "bondage" type) here under discussion. This Court denied certiorari in the *Fried* case (378 U. S. 578) simultaneously with the rendition of the *Jacobellis* decision.

**C. Patent offensiveness**

The subject books clearly evidence the second basic element of the test of obscenity, which, as explained in *Manual Enterprises,* prescribes that the material must be "patently offensive," that is, it must affront "current community standards of decency * * *" (370 U. S. at p. 482).

**1.**

The "bondage" books constitute a public flaunting of detailed, lurid descriptions and representations of revolting forms of sex perversion. It is submitted that it is self-evident that the mores of our communities do not tolerate the deliberate exhibition of such shocking and degrading spectacles of abnormal sex suffused with cruelty. It is equally clear that such material exceeds the customary limits of candor with respect to description of sexual matters. The insult to decency inflicted by such publications is aptly conveyed by language used by the New York Court of Appeals in *People* v. *Richmond County News,* 9 N. Y. 2d 578 (1961), where that Court described the indicia of obscenity as follows (p. 587):

> "Depicting dirt for dirt's sake, the obscene is the vile rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'."

**2.**

The subject books, not of the "bondage" type, represent the more common type of pornography, patently offensive in any American community. As is pointed out in *Manual Enterprises,* in most obscenity cases, the basic elements of appeal to "prurient interest" and "patent offensiveness" overlap and "tend to coalesce * * *" (370 U. S. at (p. 486). This Court there noted that it is "only in the unusual instance where, as here, the 'prurient interest' appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive." (*ibid.*)

## CONCLUSION

**The judgment below should be affirmed.**

The books involved in this case proclaim on their face that they are, in the language of *Roth* and *Jacobellis*, "utterly without redeeming social importance" (354 U. S. at p. 484; 378 U. S. at p. 191). They represent nothing but deliberately contrived, grossly indecent devices for the stimulation of erotic excitement. They are manifestly, in the language of *Manual Enterprises*, the kind of "obnoxiously debasing portrayals of sex" (370 U. S. at p. 483) which obscenity statutes may proscribe, and, as an abuse of the right of free expression, they are not entitled to constitutional protection.

October 20, 1965.

Respectfully submitted,

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RALPH [illegible]
ERGS [illegible]
INC.,

*vs.*

UNITED STATES OF AMERICA,

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

October Term, 1965
No. [illegible]

EDWARD MISHKIN,

*vs.*

STATE OF NEW YORK,

On Appeal From the Court of Appeals of the State of New York.

October Term, 1965
No. 368

A book named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS, Intervenor),

*vs.*

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

On Appeal From the Supreme Judicial Court of Massachusetts.

---

**Motion of the Committee of Religious Leaders of the City of New York for Leave to Appear as Amicus Curiae, Adopting as Its Own the Briefs of Amicus Curiae Citizens for Decent Literature, Inc., in Chief Consideration.**

---


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IN THE

# Supreme Court of the United States

October Term, 1965
No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

*vs.* *Petitioners,*

UNITED STATES OF AMERICA,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

October Term, 1965
No. 49

EDWARD MISHKIN,

*vs.* *Appellant,*

STATE OF NEW YORK,

*Appellee.*

On Appeal From the Court of Appeals of the State of New York.

October Term, 1965
No. 368

A book named "JOHN CLELAND'S MEMOIRS OF A WOMAN OF PLEASURE", G. P. PUTNAM'S SONS (Intervenor),

*vs.* *Appellant,*

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

*Appellee.*

On Appeal From the Supreme Judicial Court of Massachusetts.

**Motion of the Committee of Religious Leaders of the City of New York for Leave to Appear as Amicus Curiae, Adopting as Its Own the Briefs of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation.**

In its deep concern over the presence and continuing growth of Salacious Literature in this nation, the Committee of Religious Leaders of the City of New York has established within its framework a Committee for the Elimination of Salacious Literature, which has an absorbing interest in the obscenity cases pending before this Court. Said Committee has examined the briefs of Amicus Curiae Citizens for Decent Literature, Inc., heretofore filed in the above-mentioned cases, and has by appropriate resolution declared itself in complete agreement with, and adopted as its own, the position expressed and argued in those briefs.

The Committee of Religious Leaders of the City of New York respectfully moves for leave of Court to appear as Amicus Curiae in said cases, in support of and adopting as its own, the said briefs of Amicus Curiae Citizens for Decent Literature, Inc.

Respectfully submitted,

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1965
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*Appellant,*

*vs.*

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

*Appellee.*

On Appeal From the Supreme Judicial Court of Massachusetts.

**Motion of The American Parents Committee, Inc., for Leave to Appear as Amicus Curiae Adopting as Its Own the Briefs of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation.**

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IN THE

# Supreme Court of the United States

October Term, 1965
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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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October Term, 1965
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EDWARD MISHKIN,

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STATE OF NEW YORK,

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On Appeal From the Court of Appeals of the State of New York.

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October Term, 1965
No. 368

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*Appellant,*

*vs.*

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

*Appellee.*

On Appeal From the Supreme Judicial Court of Massachusetts.

---

**Motion of The American Parents Committee, Inc., for Leave to Appear as Amicus Curiae Adopting as Its Own the Briefs of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation.**

---

The American Parents Committee, Inc. was incorporated in 1947 as a membership, non-profit, public-service association working for federal legislation on behalf of the nation's 70 mllion children. As such it entertains a deep concern over the presence and continuing growth of obscene materials in this Nation and a substantial interest in the doctrine of the obscenity cases pending before this Court.

The American Parents Committee, Inc., has examined the briefs of Amicus Curiae Citizens for Decent Literature, Inc., heretofore filed in the cases referred to above, and has by appropriate resolution declared itself in complete agreement with, and adopted as its own, the position, expressed and argued in those briefs.

The American Parents Committee, Inc., respectfully moves for leave of Court to appear as Amicus Curiae in said cases, in support of and adopting as its own, the said briefs of Amicus Curiae Citizens for Decent Literature, Inc.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 49

EDWARD MISHKIN,

Appellant,

*against*

STATE OF NEW YORK,

Appellee.

## PETITION FOR REHEARING

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Counsel for Appellant.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Reasons for Granting Rehearing | 1 |
| Search and Seizure | 2 |
| The Due Process Question | 11 |
| Appendix | 15 |


### TABLE OF CASES


| | |
|---|---|
| A Quantity of Books v. Kansas, 378 U. S. 205 | 2, 10 |
| Bantam Books v. Sullivan | 10 |
| Boyd v. United States, 116 U. S. 616 | 10 |
| Cole v. Arkansas | 12 |
| Kremer v. United States, 353 U. S. 346 | 2, 10 |
| Lanzetta v. New Jersey, 306 U. S. 451 | 12 |
| Marcus v. Search Warrants of Property, etc., 367 U. S. 717 | 2, 10 |
| People v. Brooklyn New Co., 12 Misc. 2d 768 | 13 |
| People v. Coffey, 11 N. Y. 2d 142 | 3 |
| People v. Loria, 10 N. Y. 2d 368 | 3 |
| Stanford, Jr. v. Texas, 13 L. ed. 2d 431 (January 18, 1965) | 2 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 49

EDWARD MISHKIN,

Appellant,

*against*

STATE OF NEW YORK,

Appellee.

## PETITION FOR REHEARING

Appellant, Edward Mishkin, prays that this court grant a rehearing of its judgment of March 21, 1966, affirming the judgment of conviction of the appellant.

### Reasons for Granting Rehearing

The reasons are:

1. The court in the appellant's contentions with respect to the contentions illegal search and seizure, the events that transpired in this court *after* argument was had on December 6, 1965.

2. As to the argument concerning illegal search and seizure, the court overlooked arguments with respect to the facts in the record.

3. The court did not pass upon appellant's contention that the trial court in making a construction of the statute for the first time in *this* case (a construction contrary to its legislative history), deprived appellant of due process.

## Search and Seizure

The seizures were made without a lawful or adequate warrant. This was clearly established *after* argument in this court on December 6, 1965. During the week of December 10, 1965, Mr. Michael Rodak, Jr., deputy clerk of this court, communicated with counsel for the appellee, requesting a copy of the search warrant alleged to have been authority for the seizure of the books involved. On December 21, 1965, the district attorney wrote to Mr. Rodak, enclosing a copy of the warrant and a copy of the inventory made. The above information is taken from copies of the correspondence sent to appellant's counsel on December 28, 1965. Therefore, for the first time, so far as appellant and all the courts concerned, knowledge of the contents of the warrant was obtained. The warrant and inventory are before the court.

The statement in the opinion that "the warrant itself is [not] in the record is an oversight, unless, "record" excludes what Mr. Rodak obtained.

A reading of the warrant immediately shows that it is defective and is condemned by the decisions of this court in *Stanford, Jr.* v. *Texas,* 13 L. ed. 2d 431 (January 18, 1965); *A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Marcus* v. *Search Warrants of Property, etc.,* 367 U. S. 717; and *Kremen* v. *United States,* 353 U. S. 346.

The warrant directs the police to search in the day-time or night-time of the person and premises of Norman Levenberg (the agent of appellant) and of Edward Mishkin for books, records, equipment for printing "obscene literature", including payroll records.

A better example of a general warrant could hardly be imagined. Such a warrant is condemned not only by the Fourth Amendment, but is also violative of the First Amendment, for its language leaves to the police to determine what is "obscene literature" and enables the police to ransack and clean out a publishing establishment.

An analysis of the inventory of property seized accompanying the warrant, clarifies the record sufficiently to justify the resolution of this question. In any event, the New York Court of Appeals in illegal search issues tendered with respect to cases tried but not final through appeal before this court's decision in *Mapp* remanded cases of factual doubt for a hearing. *People* v. *Coffey,* 11 N. Y. 2d 142; *People* v. *Loria,* 10 N. Y. 2d 368. This was only fair, because New York was operating under a non-exclusionary rule, and hence all questions on the method of seizure were irrelevant and unmaterial. Trial counsel for Mishkin in this case was confronted with that rule. He nevertheless interposed his objections. It is surprising that he was able to extract as much as the record shows.

Under the circumstances, it would be only fair—assuming this court still has any doubts—to remand for a hearing on this issue. Certainly, a person facing a shocking three year sentence for selling books should be accorded the consideration given to pickpockets, gunmen and burglars.

But the illegality of the seizure at the premises of Norman Levenberg, appellant's agent, is made plain:

Each one of the books that appear in the Appendix to the court's opinion, numbered Exhibit 1 through 32, plus 10 others and comprising the counts correlated to those exhibits were therefore seized under this warrant, illegal both under the First and Fourth Amendments (R. 137).. This is very important because the appellant was sentenced to consecutive terms of imprisonment of one

year respectively under Exhibit 1 (counts 1, 111) "Chances Go Round", Exhibits 20 and 54 (count 48) "Pleasure Parade No. 1", and Exhibit 3 (count 65) "Female Sultan" (R. 718, 719).

An appendix to this brief shows the exhibit titles with their corresponding number in the seizure inventory.

The seizures under this warrant were made on January 12, 1960 at 37 West 20th Street, New York City (R. 133). What was 37 West 20th Street where the warrant was executed? The record shows that its premises rented to the defendant and whose place of business it was as a warehouse. The appellee's own witness Norman Levenberg so testified:

(R. 183):

> "Justice Gassman: Tell me, where was the warehouse? You speak about the balance of the books being sent to the warehouse. Where was that?
>
> The Witness: Well, there's two. I had two warehouses for him.
>
> Justice Gassman: You mean your warehouses?
>
> The Witness: They weren't mine—my warehouses; *they were his warehouses.* (emphasis supplied)
>
> Mr. Stein: I wanted to develop that rather fully, Your Honor.
>
> Justice Gassman: I beg your pardon?
>
> Mr. Stein: I wanted to develop that fully at a different time.
>
> Justice Gassman: I mean why not finish with it once you speak about it, so we can get to it and not get lost later on. Where were the warehouses?
>
> The Witness: The first warehouse that I got *for him* was at 44 West 17th Street. It was a basement warehouse. And—"

(R. 185):

"Q. Tell us what happened. A. Well, I went up; and I got—I got a warehouse in the same building I had my shop.

Q. Is this 37 West 20th Street? A. 37 West 20th Street.

Q. And that was approximately the middle of what year, sir? A. Middle of '58.

Q. And did you enter into any arrangement with Mr. Mishkin for the maintenance of that warehouse? A. At the beginning of every month *Mr. Mishkin would give me one hundred dollars cash, which I would pay to the landlord.*" (emphasis supplied)

"Q. What did Mr. Mishkin tell you to do about that warehouse? A. He told me to put the books in there.

Q. Books which you would have printed for him, is that correct? A. That's right.

Q. And you previously testified when you ran off the printing you would deliver approximately fifty to Publishers Outlet, is that correct? A. And fifty to the little book shop.

Q. What's the name of the little book shop? A. Midget Book Shop.

Q. Midget. And the rest you would store in one of these two warehouses, is that correct? A. Right."

(R. 188):

"Q. Now, is there anything else that you can tell this court concerning the arrangements that you and Mr. Mishkin had entered into for the maintenance of the warehouse or the care of books therein? A. Well, originally, Mr. Mishkin had another fellow taking care of the warehouse for him. In other words, I would just move the books from the binder into the warehouse, and my job was done. I would get paid, and

that was it. And some other fellow would take care of the warehouse for him. But in—I am trying to think of dates now. At one time I told Mr. Mishkin, who had never been up into this warehouse, I wanted him to take a look at that warehouse; I just wanted him up there to take a look at it. Mr. Mishkin came up there; and upon looking at the warehouse, he fired the man that was taking care of it for him and he asked me to take over that fellow's job until he could get somebody else to fill the orders for him."

(R. 341):

"Q. Isn't it a fact, Mr. Levenberg, that all of those books down in the basement which were taken by the police on January 12, 1960, were your own personal property— A. Definitely not.

Q. —kept in your own storeroom down in that building? A. Definitely not."

Thus, the place where the seizures were made were the premises of Mishkin, for which he paid and which were under his control. Levenberg merely acted as his amanuensis.

The record makes clear that Levenberg did not voluntarily part with the articles. Levenberg, appellee's witness, testified that he yielded the books to the police because of the color of their office (R. 336-339):

"Q. How long after that? A. Well, after I decided to cooperate I told them to pick up the books.

Q. All right. It was about the middle of January you said, about January 15th, that you told Inspector Plansker you were going to cooperate? Now, how long after that day was it when you told him you were going to cooperate did they go down to 37 West 20th Street and did you see them down in the basement removing the books? A. An hour or two later.

Q. On that day? A. On that day.
Q. Well, it was the 12th of January when they seized the books? A. What did I say?—January—?
Q. The 15th. A. I am sorry."

Surrender to the authority of the law is not a voluntary act. *Johnson* v. *United States,* 333 U. S. 10. Here, there was both the color of office presented by the police, four in number (R. 153) as well as the coercion of the warrant (R. 304).

So any doubt as to whether Levenberg acted voluntarily ceases.

Likewise, Levenberg made clear that the books were in the basement for immediate and early dissemination (R. 186, 189).

(R. 189):

"Q. When you took over the fellow's job, what did that entail? A. It meant filling the orders.
Q. Filling the orders for what?

Justice Galloway: For the books, wasn't it?
The Witness: For the books, yeah. For the books.
Justice Galloway: Where would you get these requisitions from for the books?
The Witness: Mr. Mishkin would have me come down to the store, and he would give me a slip of paper with the books written down on it.

Q. What would be done? A. I would go up to the warehouse and fill out the order accordingly."

There could not be a waiver of Mishkin's rights by his agent, for this court said only recently in *Stanford, Jr.* v. *Texas,* 13 L. ed, 2d 431, that even a wife could not waive consent to an illegal seizure. Levenberg was not a joint owner with Mishkin as the appellee would like to spell out.

Levenberg's testimony on behalf of the appellee makes clear that the premises were those of Mishkin, the books were those of Mishkin and they were all subject to the direction of Mishkin. The appellee brought out this evidence for the purpose of implicating Mishkin as the entrepreneur. It could not now, after *Mapp*, put a new gloss on his ownership and control.

And in connection with this problem it should be remembered that the evidence seized at 37 West 20th Street was admitted subject to the production of the warrant (R. 136).

Thus, aside from appellant's contentions under the First Amendment, so far as Exhibits 1 through 42 are concerned, there was a violation under the Fourth Amendment. That question was certified to this court by the Court of Appeals.

As to the argument under the First Amendment: the seizure of books at 20th Street was 17, 121 volumes which took two days to remove (R. 139, 137). The court's opinion stresses that the absence in the record of any indication of the total volumes in the warehouse does not present a First Amendment problem. The answer is twofold. The appellee's police witness testified in so many words that he cleaned out the place. Levenberg testified that the police seized all the books in the basement (R. 353). Therefore, the 17,121 copies comprised the total that were there. The warrant directed him to take out "obscene literature". He took those 17,121 and made an inventory of them. That alone should show that he took 100% of what was stored. The second point is that even if 17,000 volumes were taken out of 170,000 volumes there, the First Amendment would have been offended. How much more shocking can it be for 17,000 volumes to be hauled off from a publisher, especially under a general warrant with no specification of books to be seized, and with the within interpretation left to the police of what is obscene.

In such a case, surely, the First and Fourth Amendments merge. They can hardly be separated for treatment.

It is respectfully submitted that in the light of the warrant now before the court and the other matters here elucidated, there was a violation of at least the Fourth Amendment. And if there is any doubt about any of the matters, they should be remanded for a hearing since this case was tried before the *Mapp* decision.

As to the remaining exhibits that appear in the opinion Appendix as exhibit numbers 43 through 71, the Fourth and First Amendments were violated as follows:

Not one of the books seized was purchased by a policeman, except exhibit 72 purchased in August 1958, a year before all the other seizures (R. 164).

The seizures of the books at the Publishers Outlet Store was made concededly (R. 153) without a warrant on December 29, 1959 (R. 143-144). These exhibits 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67. A substantial quantity of each title was on the shelves of the book store. The prosecution in order to establish Mishkin as the principal and owner of the Publishers Outlet Store produced witnesses and documentary proof to that effect (R. 179, 531, 548, 561, 562, 654, 693). Under these circumstances the seizure of the books was a violation of the Fourth Amendment. Objection to their admission was made (R. 153-154). The appellee has sought to except itself from the force of that Amendment by contending that the books were on the open shelves. The effect of that contention is that the police are free to seize without a warrant if the articles are not concealed. In making this argument the appellee equates books with ordinary contraband. But in doing so, the appellee forgets that this court has spoken against such attempts, because books are not contraband, *per se*. To do so, would permit a policeman to establish in advance, without a warrant,

what books are obscene,—all contrary to what this court announced in the *Marcus* v. *Search Warrants, Bantam Books* v. *Sullivan, Kremen* v. *United States, A Quantity of Books* v. *Kansas* and *Boyd* v. *United States,* 116 U. S. 616.

As to the appellee's argument that the search is free from attack because the search was accompanied by an arrest, the answer is that as early as the *Boyd* case it was held that a search cannot be made for the purpose of obtaining evidence to arrest.

Since the court found no lack of clarity as to Mishkin's interest in the Publishers Outlet Store, there was an evident oversight in this court's consideration of Exhibits 43-67. It is submitted, however, that those books were unlawfully seized in violation of appellant's constitutional rights.

Exhibit 68 was seized at Midget Book Store on December 29, 1959 (R. 151). No purchase was made. No warrant was obtained (R. 153) and objection to its admission was made (R. 153-154). Exhibits 69, 70, 71 were seized at The Main Stem Book Store on February 10, 1960. Several copies of each title were seized (R. 153). No purchase was made. No warrant was obtained. Objection to their admission was made (R. 153-154). The answers given above by appellant to arguments of appellee with respect to the Publishers Outlet Store, that the illegal searches may be justified, apply also to the seizures at the Midget Book Store and The Main Stem Book Store.

Although ownership or control of Midget Book Store is not clear in the record, as the court's opinion indicates, nevertheless, there was evidence produced by the appellee to show Mishkin's control of The Main Stem Book Store

(R. 191, 617-619, 624, 626-629, 630, 633, 637). Accordingly, it becomes clear that the seizures were made with prejudice to Mishkin's constitutional rights.

As to the Midget Book Store, the answer is that if there is doubt in the record, it was not of appellant's doing. It was the state of the law in New York before *Mapp* that is responsible. In the interest of justice, therefore, the case should be sent back for a hearing.

The Court noted that there is no finding as to the extent and nature of Mishkin's interest in the latter two stores. Again, because of the state of the law at the time, such findings were not made or adequately explored.

The conclusion as to the issue of illegal search and seizure is that Mishkin's constitutional rights as to Exhibits 1-42 were certainly violated, what with the warrant and inventory now in the possession of the court. As to Exhibits 43-67 there was an oversight in disposing of this issue, because the facts and findings with respect to them were adequately established by the record. As to Exhibits 68-71, whatever doubt that may remain, should be clarified by a hearing.

## The Due Process Question

The court made no observation with respect to the due process question raised by appellant and therefore may have overlooked appellant's contentions. Appellant argued (Brief for Appellant, p. 11) that if the statute, Section 1141 were construed for the first time through this case to render "sadism" and "masochism" as synonymous with "obscenity", especially in the face of its legislative history to the contrary (Brief, p. 7), then due process is not being accorded to appellant.

The court's opinion states that the New York courts held in this case that the terms "sadistic" and

"masochistic" as well as other adjectives used in Section 1141 to describe proscribed books, are "synonymous with "obscene", citing this case 26 Misc. 2d at 154.

Aside from what we will demonstrate that the conclusion is not justified, there still remains the question, doesn't fairness dictate that this appellant be absolved from liability for a construction made for the first time in this case and made against its legislative history. Mishkin could not have known in advance that the statute included him, especially when its legislative history was to the contrary. To all appearances it seems that the violence done to the history of the legislation by the trial court was done to catch him within a protean construction of the law. Since he couldn't have known that his acts fell within its scope, he should not be held responsible now. *Lanzetta* v. *New Jersey,* 306 U. S. 451.

This due process question bothered this court in the *Winters* case and has not been resolved. It should have been resolved here because three years of imprisonment have been meted out to Mishkin in First Amendment areas. In *Winters* this question so troubled this court that when it set the case for reargument, it ordered counsel to argue this very question. The order appears in 91 L. ed. 1873 and its text at page 12 of appellant's brief. The court did not decide the question in *Winters* because its decision rested on the *assumption* that he was chargeable with knowledge of subsequent construction *Winters* page 514, citing the *Lanzetta* case. See, *Cole* v. *Arkansas,* 333 U. S. 196.

Under the circumstances, it is respectfully urged that the court consider this plea of denial of due process.

Aside from the aforesaid plea that the court consider and pass upon the due process argument, there also remains the question whether this court was bound by the construction placed upon the statute by the trial court.

While it may be an idle gesture to dwell on this, at this time, it nevertheless evokes a serious and sincere inquiry. How could this court be bound by a construction of a statute made by a trial court? True, this court in *Winters* held that the construction made by the *highest* court in the sate—the court to which the present appeal is directed—was entitled to the same dignity as if the words had been inserted by the legislature. But that was the highest court of the state! How can it be said that the words of a court in the lowest rung of the judicial structure, as here, may make pronouncements that shall be equated with the text of the legislature.

The trial court's judgment was affirmed by the Appellate Division, and that in turn by the Court of Appeals. They affirmed the judgment, but not the opinion of the trial court. Neither of appellate courts said anything concerning the construction of the statute. Can the *silence* of the Court of Appeals be deemed a construction so that it has the force of a textual statement of the law. From the earliest days dating back to the Justinian Code, a compulsion has prevailed that a law be stated so that a person could know what conduct was forbidden. How could silence of the Court of Appeals be deemed such a revelation? Silence could have implied agreement with the judgment below without construing the statute. The Court of Appeals may have been satisfied that the judgment of the Trial Court was correct on a determination, that the books fell within the scope of the obscenity statute (since the Information also charged him with "obscene" literature), without even considering the construction of the terms "sadism" and "masochism". To infer a construction such as has been accepted by this court is speculative. The cases cited by appellee in its Brief, page 57 are not cases in which a construction was deemed made by *silence*.

Nor did *People* v. *Brooklyn News Co.*, 12 Misc. 2d 768, construe the statute to apprise anyone that the terms were synonymous with "obscene." Even if any judicial sig-

nificance were to attach to the pronouncements of an inferior court as equal to the text of a legislature, the plain fact is that the single Trial Judge in that case made no explicit construction of the statute. Therefore, no one could learn from that case what the state of the law was at that time.

Irrespective however of what consideration this court gives to the words argued here that too much dignity was granted to a construction made diametrically opposed to its legislative history, nevertheless, there is still open for decision the question raised: granted such a construction is accepted, has due process been accorded to Mishkin or was he used as a guinea pig to supply the deficiencies of the statute? Was the statute construed to snare him?

Respectfully submitted,

EMANUEL REDFIELD,
Counsel for Appellant.

## APPENDIX

| *Exhibit No.* | *Title of Book* | *Inventory Warrant Item No.* |
|---|---|---|
| 1 | Chances Go Round | 16 |
| 2 | Impact | 12 |
| 3 | Female Sultan | 26 |
| 4 | Satin Satellite | 6 |
| 5 | Her Highness | 1 |
| 6 | Mistress of Leather | 61 |
| 7 | Educating Edna | 64 |
| 8 | Strange Passions | 24 |
| 9 | The Whipping Chorus Girls | 60 |
| 10 | Order Of The Day and Bound Maritally | 31 |
| 11 | Dance With The Dominant Whip | 15 |
| 12 | Cult Of The Spankers | 65 |
| 13 | Confessions | 49 |
| 14 & 46 | The House of Torture (opinion has typographical error) | 32 |
| 15 & 47 | Bound in Rubber | 38 |
| 16 & 48 | Arduous Figure Training at Bondhaven | 55 |
| 17 & 49 | Return Visit to Fetterland | 54 |
| 18 | Fearful Ordeal in Restraintland | 25 |
| 19 & 50 | Women In Distress | 56 |
| 20 & 54 | Pleasure Parade No. 1 | 14 |
| 21 & 57 | Screaming Flesh | 62 |
| 22 & 58 | Fury | 7 |
| 23 | So Firm So Fully Packed | 34 |
| 24 | I'll Try Anything Twice | 63 |
| 25 & 59 | Masque | 10 |
| 26 | Catanis | 45 |
| 27 | The Violated Wrestler | 5 |
| 28 | Betrayal | 20 |
| 29 | Swiss Bottom | 23 |
| 30 | Raw Dames | 9 |
| 31 | The Strap Returns | 78 |
| 32 | Dangerous Years | 47 |

# SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1965.

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|---|---|
| Edward Mishkin, Appellant, *v.* State of New York. | On Appeal From the Court of Appeals of New York. |

[March 21, 1966.]

Mr. Justice Brennan delivered the opinion of the Court.

This case, like *Ginzburg* v. *United States*, *ante*, also decided today, involves convictions under a criminal obscenity statute. A panel of three judges of the Court of Special Sessions of the City of New York found appellant guilty of violating § 1141 of the New York Penal Law [1] by hiring others to prepare obscene books, publish-

[1] Section 1141 of the Penal Law, in pertinent part, reads as follows:

"1. A person who . . . has in his possession with intent to sell, lend, distribute . . . any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . or who . . . prints, utters, publishes, or in any manner manufacturers, or prepares any such book . . . or who

"2. In any manner, hires, employs, uses, or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdemeanor . . . .

. . . . . .

"4. The possession by a person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section.

"5. The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex,

ing obscene books, and possessing obscene books with intent to sell them.[2] 26 Misc. 2d 152, 207 N. Y. S. 2d 390 (1960). He was sentenced to prison terms aggregating three years and ordered to pay $12,000 in fines for these crimes.[3] The Appellate Division, First Department,

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including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section."

[2] The information charged 159 counts of violating § 1141; in each instance a single count named a single book, although often the same book was the basis of three counts, each alleging one of the three types of § 1141 offenses. Of these, 11 counts were dismissed on motion of the prosecutor at the outset of the trial and verdicts of acquittal were entered on seven counts at the end of trial. The remaining § 1141 counts of which appellant was convicted are listed in the Appendix to this opinion.

Appellant was also convicted of 33 counts charging violations of § 330 of the General Business Law for failing to print the publisher's and printer's names and addresses on the books. The Appellate Division reversed the convictions under these counts, and the Court of Appeals affirmed. The State has not sought review of that decision in this Court.

[3] The trial court divided the counts into five groups for purposes of sentencing. One group consisted of the possession counts concerning books seized from a basement storeroom in a warehouse; a second group of possession counts concerned books seized from appellant's retail bookstore, Publishers' Outlet; the third consisted of the publishing counts; the fourth consisted of the counts charging him with hiring others to prepare the books, and the fifth consisted of the counts charging violations of the General Business Law. Sentences of one year and a $3,000 fine were imposed on one count of each of the first four groups; the prison sentences on the first three were made consecutive and that on the count in the fourth group was made concurrent with that in the third group. A $500 fine was imposed on one count in the fifth group. Sentence was suspended on the convictions on all other counts. The suspension of sentence does not render moot the claims as to invalidity of the convictions on those counts.

affirmed those convictions. 17 App. Div. 2d 243, 234 N. Y. S. 2d 342 (1962). The Court of Appeals affirmed without opinion. 15 N. Y. 2d 671, 204 N. E. 2d 209 (1964), remittitur amended, 15 N. Y. 2d 724, 205 N. E. 2d 201 (1965). We noted probable jurisdiction. 380 U. S. 960. We affirm.

Appellant was not prosecuted for anything he said or believed, but for what he did, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books. Fifty books are involved in this case. They portray sexuality in many guises. Some depict relatively normal heterosexual relations, but more depict such deviations as sado-machoism, fetishism, and homosexuality. Many have covers with drawings of scantly clad women being whipped, beaten, tortured, or abused. Many, if not most, are photo-offsets of typewritten books written and illustrated by authors and artists according to detailed instructions given by the appellant. Typical of appellant's instructions was that related by one author who testified that appellant insisted that the books be "full of sex scenes and lesbian scenes . . . . [T]he sex had to be very strong, it had to be rough, it had to be clearly spelled out. . . . I had to write sex very bluntly, make the sex scenes very strong. . . . [T]he sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men. . . . [H]e wanted scenes in which women were making love with women. . . . [H]e wanted sex scenes . . . in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men making love to men, and there were spankings and scenes—sex in an abnormal and irregular fashion." Another author testified that appellant instructed him "to deal very graphically with . . . the darkening of the flesh under flagellation . . . ." Artists testified in similar vein as to ap-

pellant's instructions regarding illustrations and covers for the books.

All the books are cheaply prepared paperbound "pulps" with imprinted sales prices that are several thousand percent above costs. All but three were printed by a photo-offset printer who was paid 40¢ or 15¢ per copy, depending on whether it was a "thick" or "thin" book. The printer was instructed by appellant not to use appellant's name as publisher but to print some fictitious name on each book, to "make up any name and address." Appellant stored books on the printer's premises and paid part of the printer's rent for the storage space. The printer filled orders for the books, at appellant's direction, delivering them to appellant's retail store, Publishers' Outlet, and, on occasion, shipping books to other places. Appellant paid the authors, artists, and printer cash for their services, usually at his book store.

I.

Appellant attacks § 1141 as invalid on its face, contending that it exceeds First Amendment limitations by proscribing publications that are merely sadistic or masochistic, that the terms "sadistic" and "masochistic" are impermissibly vague, and that the term "obscene" is also impermissibly vague. We need not decide the merits of the first two contentions, for the New York courts held in this case that the terms "sadistic" and "masochistic," as well as the other adjectives used in § 1141 to describe proscribed books, are "synonymous with 'obscene.'" 26 Misc. 2d, at 154., 207 N. Y. S. 2d, at 393. The contention that the term "obscene" is also impermissibly vague fails under our holding in *Roth* v. *United States*, 354 U. S. 476, 491–492. Indeed, the definition of "obscene" adopted by the New York courts in interpreting § 1141 delimits a narrower class of conduct than that delimited under the *Roth* definition, *People* v. *Richmond County*

*News, Inc.*, 9 N. Y. 2d 578, 586–587, 175 N. E. 2d 681, 685–686 (1961),[4] and thus § 1141, like the statutes in *Roth*, provides reasonably ascertainable standards of guilt.[5]

Appellant also objects that § 1141 is invalid as applied, *first*, because the books he was convicted of publishing, hiring others to prepare, and possessing for sale are not obscene, and *second*, because the proof of scienter is inadequate.

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[4] "It [obscene material covered by § 1141] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Lawrence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty.' (Murray, Literature and Censorship, 14 Books on Trial 393, 394; see, also, Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 65.)" 9 N. Y. 2d, at 587, 175 N. E. 2d, at 686.

See also *People* v. *Fritch*, 13 N. Y. 2d 119, 123, 192 N. E. 2d 713, 716 (1963):

"In addition to the foregoing tests imposed by the decisions of the [United States] Supreme Court, this court interpreted section 1141 of the Penal Law in *People* v. *Richmond County News* . . . as applicable only to material which may properly be termed 'hard-core pornography'."

[5] The stringent scienter requirement of § 1141, as interpreted in *People* v. *Finkelstein*, 9 N. Y. 342, 345, 174 N. E. 2d 470, 472 (1961), also eviscerates much of appellant's vagueness claim. See, *infra*, pp. 8–9. See generally, *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 342; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 412–413; *Screws* v. *United States*, 325 U. S. 91, 101–104 (opinion of Mr. Justice Douglas); *United States* v. *Ragen*, 314 U. S. 513, 524; *Gorin* v. *United States*, 312 U. S. 19, 27–28; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501–503; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348.

1. *The Nature of the Material.*—The First Amendment prohibits criminal prosecution of the publication and dissemination of allegedly obscene books that do not satisfy the *Roth* definition of "obscenity." States are free to adopt other definitions of "obscenity" only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition, which restrict the regulation of the publication and sale of books to that traditionally and universally tolerated in our society.

The New York courts have interpreted "obscenity" in § 1141 to cover only so-called "hard-core pornography," see *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 586–587, 175 N. E. 2d 681–685, 686 (1961), quoted in note 4, *supra*. Since that definition of "obscenity" is more stringent than the *Roth* definition, the judgment that the constitutional criteria are satisfied is implicit in the application of § 1141 below. Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution,[6] those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that "instead of stimulating the erotic, they disgust and sicken." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the

[6] It could not be plausibly maintained that all of the appellant's books, including those dominated by descriptions of relatively normal heterosexual relationships, are devoid of the requisite prurient appeal.

prurient interest in sex of the members of that group. The reference to the "average" or "normal" person in *Roth*, 354 U. S., at 489–490, does not foreclose this holding.[7] In regard to the prurient-appeal requirement, the concept of the "average" or "normal" person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina* v. *Hicklin*, [1868] L. R. 3 Q. B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons,[8] it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.

No substantial claim is made that the books depicting sexually deviant practices are devoid of prurient appeal to sexually deviant groups. The evidence fully establishes that these books were specifically conceived and marketed for such groups. Appellant instructed his

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[7] See *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 482 (opinion of HARLAN, J.); Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 72–73 (1960).

It is true that some of the material in *Alberts* v. *California*, decided with *Roth*, resembled the deviant material involved here. But no issue involving the obscenity of the material was before us in either case. 354 U. S., at 481, n. 8. The basic question for decision there was whether the publication and sale of obscenity, however defined, could be criminally punished in light of First Amendment guarantees. Our discussion of definition was not intended to develop all the nuances of a definition required by the constitutional guarantees.

[8] See generally, 1 American Handbook of Psychiatry (Arieti ed. 1959) 593–604, for a description of the pertinent types of deviant sexual groups.

authors and artists to prepare the books expressly to induce their purchase by persons who would probably be sexually stimulated by them. It was for this reason that appellant "wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong." And to be certain that authors fulfilled his purpose, appellant furnished them with such source materials as Caprio, *Variations in Sexual Behaviour* and Krafft-Ebing, *Psychopathia Sexualis*. Not only was there proof of the books' prurient appeal, compare *United States* v. *Klaw*, 350 F. 2d 155 (C. A. 2d Cir. 1965), but the proof was compelling; in addition appellant's own evaluation of his material confirms such a finding. See *Ginzburg* v. *United States*, *ante*.

2. *Scienter.*—In *People* v. *Finkelstein*, 9 N. Y. 2d 342, 344–345, 174 N. E. 2d 470, 472 (1961), the New York Court of Appeals authoritatively interpreted § 1141 to require the "vital element of scienter," and it defined the required mental element in these terms:

> "A reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the *character* of the material they attempt to distribute should be punished. It is not innocent but *calculated purveyance* of filth which is exorcised . . . ." (Emphasis added.)[9]

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[9] For a similar scienter requirement see Model Penal Code § 251.4 (2); Commentary, Model Penal Code (Tentative Draft No. 6, 1957), 14, 49–51; cf. Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669, 677 (1963).

We do not read Judge Froessel's parenthetical reference to knowledge of the contents of the books in his opinion in *People* v. *Finkelstein*, 11 N. Y. 2d 300, 304, 183 N. E. 2d 661, 663 (1962), as a modification of this definition of scienter. Cf. *People* v. *Fritch*, 13 N. Y. 119, 126, 192 N. E. 2d 713, 717–718 (1963).

Appellant's challenge to the validity of § 1141 founded on *Smith* v. *California*, 361 U. S. 147, is thus foreclosed,[10] and this construction of § 1141 makes it unnecessary for us to define today "what sort of mental element is requisite to a constitutionally permissible prosecution." *Id.*, at 154. The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the scienter required by § 1141 amply serves those ends, and therefore fully meets the demands of the Constitution.[11] Cf. *Roth* v. *United States*, 354 U. S., at 495–496 (WARREN, C. J., concurring).

Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, of appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise

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[10] The scienter requirement set out in the text would seem to be, as a matter of state law, as applicable to publishers as it is to booksellers; both type of activities are encompassed within subdivision 1 of § 1141. Moreover, there is no need for us to speculate as to whether this scienter requirement is also present in subdivision 4 of § 1141 (making it a crime to hire others to prepare obscene books); for appellant's convictions for that offense involved books of which he was also convicted of publishing.

No constitutional claim was asserted below or in this Court as to the possible duplicative character of the hiring and publishing counts.

[11] The first appeal in *Finkelstein* defining the scienter required by § 1141 was decided after this case was tried, but before the Appellate Division and Court of Appeals affirmed these convictions. We therefore conclude that the state appellate courts were satisfied that the § 1141 scienter requirement was correctly applied at trial.

The § 1141 counts did not allege appellant's knowledge of the character of the books, but appellant has not argued, below or here, that this omission renders the information constitutionally inadequate.

that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that appellant "was aware of the character of the material" and that his activity was "not innocent but calculated purveyance of filth."

II.

Appellant claims that all but one of the books were improperly admitted in evidence because they were fruits of illegal searches and seizures. This claim is not capable in itself of being brought here by appeal, but only by a petition for a writ of certiorari under 28 U. S. C. § 1257 (3) as specifically setting up a federal constitutional right.[12] Nevertheless, since appellant challenged the constitutionality of § 1141 in this prosecution, and the New York courts sustained the statute, the case is properly here on appeal, and our unrestricted notation of probable jurisdiction justified appellant's briefing of the search and seizure issue. *Flournoy* v. *Weiner*, 321 U. S. 253, 263; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547. The nonappealable issue is treated, however, as if contained in a petition for a writ of certiorari, see 28 U. S. C. § 2103, and the unrestricted notation of probable jurisdiction of the appeal is to be understood as a grant of the writ on that issue. The issue thus remains within our certiorari jurisdiction, and we may, for good rea-

[12] Unlike the claim here, the challenges decided in the appeals in *Marcus* v. *Search Warrant*, 367 U. S. 717, and *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205, implicated the constitutional validity of statutory schemes establishing procedures for seizing the books.

son, even at this stage, decline to decide the merits of the issue, much as we would dismiss a writ of certiorari as improvidently granted. We think that this is a case for such an exercise of our discretion.

The far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision. Appellant's standing to assert the claim in regard to all the seizures is not entirely clear; there is no finding on the extent or nature of his interest in two book stores, the Main Stem Book Shop and Midget Book Shop, from which some of the books were seized. The State seeks to justify the basement storeroom seizure, in part, on the basis of the consent of the printer-accomplice; but there were no findings as to the authority of the printer over the access to the storeroom, or as to the voluntariness of his alleged consent. It is also maintained that the seizure in the storeroom was made on the authority of a search warrant; yet neither the affidavit upon which the warrant issued nor the warrant itself is in the record. Finally, while the search and seizure issue has a First Amendment aspect because of the alleged massive quality of the seizures, see *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205, 206 (opinion of BRENNAN, J.); *Marcus* v. *Search Warrant*, 367 U. S. 717, the record in this regard is inadequate. There is neither evidence nor finding as to how many of the total available copies of the books in the various book stores were seized and it is impossible to determine whether the books seized in the basement storeroom were on the threshold of dissemination. Indeed, this First Amendment aspect apparently was not presented or considered by the state courts, nor was it not raised in appellant's jurisdictional statement; it appeared for the first time in his brief on the merits.

In light of these circumstances, which were not fully apprehended at the time we took the case, we decline

to reach the merits of the search and seizure claim; insofar as notation of probable jurisdiction may be regarded as a grant of the certiorari writ on the search and seizure issue, that writ is dismissed as improvidently granted. "Examination of a case on the merits . . . may bring into 'proper focus' a consideration which . . . later indicates that the grant was improvident." *The Monrosa* v. *Carbon Black*, 359 U. S. 180, 184.

*Affirmed.*

# APPENDIX.

## THE CONVICTIONS BEING REVIEWED.

| *Exhibit No.* | *Title of Book* | § 1141 Counts Naming the Book. *Possession* | *Publishing* | *Hiring Others* |
|---|---|---|---|---|
| 1 | Chances Go Around | 1 | 63 | 111 |
| 2 | Impact | 2 | 64 | 112 |
| 3 | Female Sultan | 3 | 65 | 113 |
| 4 | Satin Satellite | 4 | | |
| 5 | Her Highness | 5 | 67 | 115 |
| 6 | Mistress of Leather | 6 | 68 | 116 |
| 7 | Educating Edna | 7 | 69 | 117 |
| 8 | Strange Passions | 8 | 70 | 118 |
| 9 | The Whipping Chorus Girls | 9 | 71 | 119 |
| 10 | Order Of The Day and Bound Maritally | 10 | 72 | 120 |
| 11 | Dance With the Dominant Whip | 11 | 73 | 121 |
| 12 | Cult Of The Spankers | 12 | 74 | 122 |
| 13 | Confessions | 13 | 75 | 123 |
| 14 & 46 | The Hours Of Torture | 14 & 40 | 76 | 124 |
| 15 & 47 | Bound In Rubber | 15 & 41 | 77 | 125 |
| 16 & 48 | Arduous Figure Training at Bondhaven | 16 & 42 | 78 | 126 |
| 17 & 49 | Return Visit To Fetterland | 17 & 43 | 79 | 127 |
| 18 | Fearful Ordeal In Restraintland | 18 | 80 | 128 |
| 19 & 50 | Women In Distress | 19 & 44 | 81 | 129 |
| 20 & 54 | Pleasure Parade No. 1 | 20 & 48 | 82 | 130 |
| 21 & 57 | Screaming Flesh | 21 & 51 | 86 | 134 |
| 22 & 58 | Fury | 22 & 52 | | |
| 23 | So Firm So Fully Packed | 23 | 87 | 135 |
| 24 | I'll Try Anything Twice | 24 | | |
| 25 & 59 | Masque | 25 & 53 | | |
| 26 | Catanis | 26 | | |
| 27 | The Violated Wrestler | 27 | 89 | 137 |
| 28 | Betrayal | 28 | | |
| 29 | Swish Bottom | 29 | 90 | 138 |
| 30 | Raw Dames | 30 | 91 | 139 |
| 31 | The Strap Returns | 31 | 92 | 140 |
| 32 | Dangerous Years | 32 | 93 | 141 |

| *Exhibit No.* | *Title of Book* | § 1141 Counts Naming the Book. *Possession* | *Publishing* | *Hiring Others* |
|---|---|---|---|---|
| 43 | Columns of Agony | 37 | 95 | 144 |
| 44 | The Tainted Pleasure | 38 | 96 | 145 |
| 45 | Intense Desire | 39 | 97 | 146 |
| 51 | Pleasure Parade No. 4 | 45 | 85 | 133 |
| 52 | Pleasure Parade No. 3 | 46 | 84 | 132 |
| 53 | Pleasure Parade No. 2 | 47 | 83 | 131 |
| 55 | Sorority Girls Stringent Initiation | 49 | 98 | 147 |
| 56 | Terror At The Bizarre Museum | 50 | 99 | 148 |
| 60 | Temptation | 57 | | |
| 61 | Peggy's Distress On Planet Venus | 58 | 101 | 150 |
| 62 | Ways of Discipline | 59 | 102 | 151 |
| 63 | Mrs. Tyrant's Finishing School | 60 | 103 | 152 |
| 64 | Perilous Assignment | 61 | 104 | 153 |
| 68 | Bondage Correspondence | | 107 | 156 |
| 69 | Woman Impelled | | 106 | 155 |
| 70 | Eye Witness | | 108 | 157 |
| 71 | Stud Broad | | 109 | 158 |
| 72 | Queen Bee | | 110 | 159 |

# SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1965.

| | |
|---|---|
| Edward Mishkin, Appellant, *v.* State of New York. | On Appeal From the Court of Appeals of New York. |

[March 21, 1966.]

Mr. Justice Harlan, concurring.

On the issue of obscenity I concur in the judgment of affirmance on premises stated in my dissenting opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General, ante,* p. ——. In all other respects I agree with and join the Court's opinion.

# SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1965.

| | |
|---|---|
| Edward Mishkin, Appellant, v. State of New York. | On Appeal From the Court of Appeals of New York. |

[March 21, 1966.]

Mr. Justice Black, dissenting.

The Court here affirms a conviction and prison sentence of three years plus a fine of $12,000 imposed on appellant Mishkin based on state charges that he hired others to prepare and publish obscene books and that Mishkin himself possessed such books. This Court has held in many cases that the Fourteenth Amendment makes the First applicable to the States. See, *e. g.*, for illustration cases collected in my concurring opinion in *Speiser* v. *Randall*, 357 U. S. 513, 530. Consequently upon the same grounds that I dissented from a five-year federal sentence imposed upon Ginzburg in No. 42, *ante*, p. —, for sending "obscene" printed matter through the United States mails I dissent from affirmance of this three-year state sentence imposed on Mishkin. Neither in this case nor in *Ginzburg* have I read the alleged obscene matter. This is because I believe for reasons stated in my dissent in *Ginzburg* and in many other prior cases that this Court is without constitutional power to censor speech or press regardless of the particular subject discussed. I think the federal judiciary because it is appointed for life is the most appropriate tribunal that could be selected to interpret the Constitution and thereby mark the boundaries of what government agencies can and cannot do. But because of life tenure, as well as other reasons, the federal judiciary is the least appropriate branch of government to take over censor-

ship responsibilities by deciding what pictures and writings people throughout the land can be permitted to see and read. When this Court makes particularized rules on what people can see and read, it determines which policies are reasonable and right, thereby performing the classical function of legislative bodies directly responsible to the people. Accordingly, I wish once more to express my objections to saddling this Court with the irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of this Court what pornography (whatever that means) is too hard core for people to see or read. If censorship of views about sex or any other subject is constitutional then I am reluctantly compelled to say that I believe the tedious, time-consuming and unwelcome responsibility for finally deciding what particular discussions or opinions must be suppressed in this country, should, for the good of this Court and of the Nation, be vested in some governmental institution or institutions other than this Court.

I would reverse this conviction. The three-year sentence imposed on Mishkin and the five-year sentence imposed on Ginzburg for expressing views about sex are minor in comparison with those more lengthy sentences that are inexorably bound to follow in state and federal courts as pressures and prejudices increase and grow more powerful, which of course they will. Nor is it a sufficient answer to these assuredly ever-increasing punishments to rely on this Court's power to strike down "cruel and unusual punishments" under the Eighth Amendment. Distorting or stretching that Amendment by reading it as granting unreviewable power to this Court to perform the legislative function of fixing punishments for all state and national offenses offers a sadly inadequate solution to the multitudinous problems generated by what I consider to be the un-American policy of censoring the

thoughts and opinions of people. The only practical answer to these concededly almost unanswerable problems is, I think, for this Court to decline to act as a national board of censors over speech and press but instead to stick to its clearly authorized constitutional duty to adjudicate cases over things and conduct. Halfway censorship methods, no matter how laudibly motivated, cannot in my judgment protect our cherished First Amendment freedoms from the destructive aggressions of both state and national government. I would reverse this case and announce that the First and Fourteenth Amendments taken together command that neither Congress nor the States shall pass laws which in any manner abridge freedom of speech and press—whatever the subjects discussed. I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass "no law" regulating speech and press but should confine its legislation to the regulation of conduct. So too, that policy of the First Amendment made applicable to the States by the Fourteenth, leaves the States vast power to regulate conduct but no power at all, in my judgment, to make the expression of views a crime.

# SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1965.

| | |
|---|---|
| Edward Mishkin, Appellant, v. State of New York. | On Appeal From the Court of Appeals of New York. |

[March 21, 1966.]

Mr. Justice Stewart, dissenting.

The petitioner was sentenced to three years in prison for publishing numerous books. However tawdry those books may be, they are not hard-core pornography, and their publication is, therefore, protected by the First and Fourteenth Amendments. *Ginzburg* v. *United States*, — U. S. —, at — (dissenting opinion). The judgment should be reversed.*

*See *Ginzburg* v. *United States*, — U. S. —, at —, note 3 (dissenting opinion). Moreover, there was no evidence at all that any of the books are the equivalent of hard-core pornography in the eyes of any particularized group of readers. Cf. *United States* v. *Klaw*, 350 F. 2d 155 (C. A. 2d Cir.).

Although the New York Court of Appeals has purported to interpret § 1141 to cover only what it calls "hard-core pornography," this case makes abundantly clear that that phrase has by no means been limited in New York to the clearly identifiable and distinct class of material I have described in *Ginzburg* v. *United States*, — U. S. —, at —, note 3 (dissenting opinion).